# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1924

No. [redacted]78

ERIE COAL & COKE CORPORATION, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JUNE 2, 1922.

($0,859)

(29,659)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1923.**

# No. 351.

ERIE COAL & COKE CORPORATION, APPELLANT,

*vs.*

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 10, 1923.

[fol. 1] **COURT OF CLAIMS OF THE UNITED STATES**

ERIE COAL AND COKE CORPORATION

v.

UNITED STATES.

I. PETITION—Filed Feb. 26, 1923—AND AMENDED PETITION—Filed Mar. 14, 1923

To the Honorable Court of Claims:

Petitioner for an Amended Petition herein respectfully alleges and shows to the Court:

1. That your claimant is a corporation duly organized and existing under and by virtue of the laws of the State of New York and lawfully engaged in business under the laws of the State of New York, with its office and principal place of business in the City, County and State of New York.

2. The Act of Congress of July 11, 1919 (41 U. S. Statutes, 105), conferred upon the Secretary of War the right, power and authority to sell any surplus supplies in the possession of the Government for the use of the War Department, to any corporation or individual, upon such terms as may be deemed best.

[fol. 2] 3. In the exercise of the authority and discretion conferred upon him by the Act of Congress of July 11, 1919, Honorable John W. Weeks, Secretary of War for the United States, did cause to be published and circulated an advertisement (Claimant's Exhibit A, hereto annexed and made a part hereof as if herein fully set forth) for the sale, at public auction, of approximately 40,000 short tons of sodium nitrate of the grade, kind and quality specified in Claimant's Exhibit B, hereto annexed, the same being surplus supplies in possession of the Government for use of the War Department.

4. That pursuant to the authority in him vested by said Act of Congress, the said Secretary of War did issue and circulate, as the terms of sale of said auction, a document, a copy of which is hereto annexed marked Claimant's Exhibit B and made a part hereof as if herein fully set forth.

5. That the said auction sale was largely attended, there being present and registered more than one hundred interested parties and prospective bidders.

6. That pursuant to such authority and such notice, and upon the terms stated in Claimant's Exhibit B, the Secretary of War, by Robert Fox, his duly appointed auctioneer, did offer for sale as a part of the sodium nitrate so advertised for sale, one lot of 13,920 short tons of sodium nitrate, located at Middletown, Pa.

7. That this claimant did then and there bid for said lot of 13,920 tons upon the terms and conditions offered in said circular advertisements of auction sale, the sum of $25.00 per ton, or a total of $348,000.

[fol. 3] 8. That this claimant's bid was the highest bid at said auction sale for said lot of sodium nitrate and the same was then and there knocked down and sold to this claimant at the said price upon the terms and conditions set forth in the circular advertisements of auction sale, Claimant's Exhibit B, hereto annexed.

9. That pursuant to the terms and conditions of said auction sale, as contained and set forth in Claimant's Exhibit B hereto annexed, this claimant did then and there deposit with the Ordnance Department of the War Department as part payment upon the sale, $20,000, in a certificate of deposit of the American Exchange National Bank and $22,000 in par value of United States Loan Bonds, making a total of $42,000 on account thereof, which was accepted and a receipt therefor issued to this claimant, a copy of which is hereto annexed marked Claimant's Exhibit C and made a part hereof as if herein fully set forth.

10. That thereafter and on the 22nd and 24th days of April, 1922, this claimant, by its duly authorized Treasurer, attended at the office of the Secretary of War, at Washington, D. C., and then and there offered to sign and enter into, and demanded that the Secretary of War sign and enter into a written agreement as provided for in the terms set forth in Claimant's Exhibit B hereto annexed, and then and there offered to pay the balance of the full purchase price of said lot of sodium nitrate and to do and perform each, every and all of the terms, conditions and undertakings by it agreed to be performed; then and there demanded that the Secretary of War, pursuant to the terms of said auction sale, deliver to claimant the said lot of sodium [fol. 4] nitrate at Middletown, Pa., and offered to hold itself ready and willing to do and perform all the terms, conditions and undertakings by it agreed to be performed until and including Monday, April 24, 1922.

11. That the Secretary of War refused claimant's said offer of performance and failed, refused and neglected to comply with its said demands stating his reason for his refusal that in his opinion the aforesaid price of $25.00 per ton for said sodium nitrate was inadequate.

12. That from the 13th day of April, 1922, to and including the 24th day of April, 1922, this claimant held itself ready, able and willing, and offered to do and perform all the terms, conditions and undertakings by it agreed to be done or performed.

13. That thereafter the Secretary of War on or about June 1, 1922, returned to this claimant the amount deposited as a part payment as aforesaid, which it accepted without prejudice to any of its claims or rights against the Government of the United States.

14. On information and belief, the fair and reasonable market value of said sodium nitrate, at Middletown, Pa., on the 13th day of April, 1922, and to and including the 24th day of April, 1922, was $63.60 per ton, and the total value of the whole lot of 13,920 tons was $885,312.

15. Your petitioner represents that by reason of the facts hereinbefore stated it has been damaged and is entitled to be paid by the United States the sum of $537,312, against which there are no just credits or off-sets.

[fol. 5] 16. No other action than that recited hereinbefore has been had on this claim in the Congress of the United States; or by any of the Departments of the Government of the United States; no assignment or transfer of this claim, or any part thereof, or interest therein has been made.

17. Your claimant has not in any way voluntarily aided, abetted or given encouragement to rebellion against the Government of the United States.

Your claimant for a second separate claim respectfully alleges as follows:

18. That your claimant is a corporation duly organized and existing under and by virtue of the laws of the State of New York and lawfully engaged in business under the laws of the State of New York, with its office and principal place of business in the City, County and State of New York.

19. The Act of Congress of July 11, 1919 (41 U. S. Statutes, 105), conferred upon the Secretary of War the right, power and authority to sell any surplus supplies in the possession of the Government for the use of the War Department, to any corporation or individual, upon such terms as may be deemed best.

20. In the exercise of the authority and discretion conferred upon him by the Act of Congress of July 11, 1919, Honorable John W. Weeks, Secretary of War for the United States, did cause to be published and circulated an advertisement (Claimant's Exhibit A hereto annexed and made a part hereof as if herein fully set forth) for the sale, at public auction, of approximately 40,000 short tons of sodium [fol. 6] nitrate of the grade, kind and quality specified in Claimant's Exhibit B hereto annexed; the same being surplus supplies in the possession of the Government, for use of the War Department.

21. That pursuant to the authority in him vested by said Act of Congress, the said Secretary of War did issue and circulate, as the terms of sale of said auction, a document, a copy of which is hereto annexed marked Claimant's Exhibit B, and made a part hereof as if herein fully set forth.

22. That the said auction sale was largely attended, there being present and registered more than one hundred interested parties and prospective bidders.

23. That pursuant to such authority and such notice, and upon the terms stated in Claimant's Exhibit B, the Secretary of War, by Robert Fox, his duly appointed auctioneer, did offer for sale as a part of the sodium nitrate so advertised for sale, one lot of 5,000 short tons of sodium nitrate, located at Nitro, West Virginia.

24. That this claimant did then and there bid for said lot of 5,000 tons upon the terms and conditions offered in said circular advertisements of auction sale, the sum of $25.00 per ton, or a total of $125,000.

25. That this claimant's bid was the highest bid at said auction sale for said lot of sodium nitrate and the same was then and there knocked down and sold to his claimant at the said price upon the terms and conditions set forth in the circular advertisements of auction sale, Claimant's Exhibit B hereto annexed.

[fol. 7] 26. That pursuant to the terms and conditions of said auction sale, as contained and set forth in Claimant's Exhibit B hereto annexed this claimant did then and there deposit with the Ordance Department of the War Department as part payment upon the sale $13,000 in par value of United States Loan Bonds, which was accepted and a receipt therefor issued to this claimant, a copy of which is hereto annexed marked Claimant's Exhibit D and made a part hereof as if herein fully set forth.

27. That thereafter and on the 22nd and 24th days of April, 1922, this claimant, by its duly authorized Treasurer, attended at the office of the Secretary of War, at Washington, D. C., and then and there offered to sign and enter into and demanded that the Secretary of War sign and enter into a written agreement as provided for in the terms set forth in Claimant's Exhibit B hereto annexed, and then there offered to pay the balance of the full purchase price of said lot of sodium nitrate and to do and perform each, every and all of the terms, conditions and undertakings by it agreed to be performed; then and there demanded that the Secretary of War, pursuant to the terms of said auction sale, deliver to claimant the said lot of sodium nitrate at Nitro, West Virginia, and offered to hold itself ready and willing to do and perform all the terms, conditions and undertakings by it agreed to be performed until and including Monday, April 24, 1922.

28. That the Secretary of War refused claimant's said offers of performance and failed, refused and neglected to comply with its said demands stating his reason for his refusal that in his opinion the aforesaid price of $25.00 per ton for said sodium nitrate was inadequate.

[fol. 8] 29. That from the 13th day of April, 1922, to and including the 24th day of April, 1922, this claimant held itself ready, able and willing, and offered to do and perform all the terms, conditions and undertakings by it agreed to be done or performed.

30. That thereafter the Secretary of War on or about June 1, 1922, returned to this claimant the amount deposited as a part payment as aforesaid, which it accepted without prejudice to any of its claims or rights against the Government of the United States.

31. On information and belief, the fair and reasonable market value of said sodium nitrate, at Nitro, West Virginia, on the 13th day of April, 1922, and to and including the 24th day of April, 1922, was $66.08 per ton, and the total value of the whole lot of 5,000 tons was $330,400.

32. Your petitioner represents that by reason of the facts hereinbefore stated it has been damaged and is entitled to be paid by the United States the sum of $205,400, against which there are no just credits or offsets.

33. No other action than that recited hereinbefore has been had on this claim in the Congress of the United States, or by any of the Departments of the Government of the United States; no assignment or transfer of this claim, or any part thereof, or interest therein, has been made.

34. Your claimant has not in any way voluntarily aided, abetted or given encouragement to rebellion against the Government of the United States.

[fol. 9] Your claimant for a third separate claim respectfully alleges as follows:

35. That your claimant is a corporation duly organized and existing under and by virtue of the laws of the State of New York and lawfully engaged in business under the laws of the State of New York, with its office and principal place of business in the City, County and State of New York.

36. The Act of Congress of July 11, 1919 (41 U. S. Statutes, 105), conferred upon the Secretary of War the right, power and authority to sell any surplus supplies in the possession of the Government for the use of the War Department, to any corporation or individual, upon such terms as may be deemed best.

37. In the exercise of the authority and discretion conferred upon him by the Act of Congress of July 11, 1919, Honorable John W. Weeks, Secretary of War for the United States, did cause to be published and circulated an advertisement (Claimant's Exhibit A hereto annexed and made a part hereof as if herein fully set forth) for the sale, at public auction, of approximately 40,000 short tons of sodium nitrate of the grade, kind and quality specified in Claimant's Exhibit B hereto annexed the same being surplus supplies in possession of the Government for use of the War Department.

38. That pursuant to the authority in him vested by said Act of Congress, the said Secretary of War did issue and circulate, as the terms of sale of said auction, a document, a copy of which is hereto

annexed marked Claimant's Exhibit B and made a part hereof as if herein fully set forth.

[fol. 10] 39. That the said auction sale was largely attended, there being present and registered more than one hundred interested parties and prospective bidders.

40. That pursuant to such authority and such notice, and upon the terms stated in Claimant's Exhibit B the Secretary of War, by Robert Fox, his duly appointed auctioneer, did offer for sale as a part of the sodium nitrate so advertised for sale, one lot of 10,600 short tons of sodium nitrate, located at Jacksonville, Tenn.

41. That this claimant did then and there bid for said lot of 10,600 tons upon the terms and conditions offered in said circular advertisements of auction sale, the sum of $22.50 per ton, or a total of $238,500.

42. That this claimant's bid was the highest bid at said auction sale for said lot of sodium nitrate and the same was then and there knocked down and sold to this claimant at the said price upon the terms and conditions set forth in the circular advertisements of auction sale, Claimant's Exhibit B hereto annexed.

43. That pursuant to the terms and conditions of said auction sale, as contained and set forth in Claimant's Exhibit B hereto annexed, this claimant did then and there deposit with the Ordnance Department of the War Department, as part payment upon the sale, $24,000, in par value of United States Loan Bonds, which was accepted and a receipt therefor issued to this claimant, a copy of which is hereto annexed marked Claimant's Exhibit D and made a part hereof as if herein fully set forth.

[fol. 11] 44. That thereafter and on the 22nd and 24th days of April, 1922, this claimant, by its duly authorized Treasurer, attended at the office of the Secretary of War, at Washington, D. C., and then and there offered to sign and enter into and demanded that the Secretary of War sign and enter into a written agreement as provided for in the terms set forth in Claimant's Exhibit B hereto annexed, and then and there offered to pay the balance of the full purchase price of said lot of sodium nitrate and to do and perform each, every and all of the terms, conditions and undertakings by it agreed to be performed; then and there demanded that the Secretary of War, pursuant to the terms of said auction sale, deliver to claimant the said lot of sodium nitrate at Jacksonville, Tenn., and offered to hold itself ready and willing to do and perform all the terms, conditions and undertakings by it agreed to be performed until and including Monday, April 24, 1922.

45. That the Secretary of War refused claimant's said offers of performance and failed, refused and neglected to comply with its said demands stating his reason for his refusal that in his opinion the aforesaid price of $22.50 per ton for said sodium nitrate was inadequate.

46. That from the 13th day of April, 1922, to and including the 24th day of April, 1922, this claimant held itself ready, able and willing, and offered to do and perform all the terms, conditions and undertakings by it agreed to be done or performed.

47. That thereafter the Secretary of War on or about June 1, 1922, returned to this claimant the amount deposited as a part payment as [fol. 12] aforesaid, which it accepted without prejudice to any of its claims or rights against the Government of the United States.

48. On information and belief, the fair and reasonable market value of said sodium nitrate, at Jacksonville, Tenn., on the 13th day of April, 1922, and to and including the 24th day of April, 1922, was $66.43 per ton, and the total value of the whole lot of 10,600 tons was $704,158.

49. Your petitioner represents that by reason of the facts hereinbefore stated it has been damaged and is entitled to be paid by the United States the sum of $465,658, against which there are no just credits or offsets.

50. No other action than that recited hereinbefore has been had on this claim in the Congress of the United States, or by any of the Departments of the Government of the United States; no assignment or transfer of this claim, or any part thereof, or interest therein, has been made.

51. Your claimant has not in any way voluntarily aided, abetted or given encouragement to rebellion against the Government of the United States.

Your claimant for a fourth separate claim respectfully alleges as follows:

52. That your claimant is a corporation duly organized and existing under and by virtue of the laws of the State of New York and lawfully engaged in business under the laws of the State of New [fol. 13] York, with its office and principal place of business in the City, County and State of New York.

53. The Act of Congress of July 11, 1919 (41 U. S. Statutes, 105), conferred upon the Secretary of War the right, power and authority to sell any surplus supplies in the possession of the Government for the use of the War Department, to any corporation or individual, upon such terms as may be deemed best.

54. In the exercise of the authority and discretion conferred upon him by the Act of Congress of July 11, 1919, Honorable John W. Weeks, Secretary of War for the United States, did cause to be published and circulated an advertisement (Claimant's Exhibit A hereto annexed and made a part hereof as if herein fully set forth) for the sale, at public auction, of approximately 40,000 short tons of sodium nitrate of the grade, kind and quality specified in Claimant's

Exhibit B hereto annexed, the same being surplus supplies in the possession of the Government for use of the War Department.

55. That pursuant to the authority in him vested by said Act of Congress, the said Secretary of War did issue and circulate, as the terms of sale of said auction, a document, a copy of which is hereto annexed marked Claimant's Exhibit B and made a part hereof as if herein fully set forth.

56. That the said auction sale was largely attended, there being present and registered more than one hundred interested parties and prospective bidders.

[fol. 14] 57. That pursuant to such authority and such notice, and upon the terms stated in Claimant's Exhibit B the Secretary of War, by Robert Fox, his duly appointed auctioneer, did offer for sale as a part of the sodium nitrate so advertised for sale, three lots embracing 29,520 short tons of sodium nitrate, located 13,920 tons at Middletown, Pa., 5,000 tons at Nitro, West Virginia, and 10,600 tons at Jacksonville, Tenn.

58. That this claimant did then and there bid for said three lots of 13,920, 5,000 and 10,600 tons upon the terms and conditions offered in said circular advertisements of auction sale the sum of $25.00 per ton for that at Middletown, Pa., and Nitro, West Virginia, and $22.50 per ton for that at Jacksonville, Tenn., or a total of $711,500.

59. That this claimant's bid was the highest bid at said auction sale for said lots of sodium nitrate and the same were then and there knocked down and sold to this claimant at the said price upon the terms and conditions set forth in the circular advertisements of auction sale, Claimant's Exhibit B hereto annexed.

60. That pursuant to the terms and conditions of said auction sale, as contained and set forth in Claimant's Exhibit B hereto annexed, this claimant did then and there deposit with the Ordnance Department of the War Department as a part payment upon the sale $20,000 in a certificate of deposit of the American Exchange National Bank and $59,000. in par value of the United States Government Loan Bonds, making a total of $79,000. on account thereof, which was accepted and receipts therefor issued to this claimant. [fol. 15] copies of which are hereto annexed marked Claimant's Exhibits C and D and made a part hereof as if herein fully set forth.

61. That thereafter and on the 22nd and 24th of April, 1922, this claimant, by its duly authorized Treasurer, attended at the office of the Secretary of War, at Washington, D. C., and then and there offered to sign and enter into and demanded that the Secretary of War sign and enter into a written agreement as provided for in the terms set forth in Claimant's Exhibit B hereto annexed, and then and there offered to pay the balance of the full purchase price

of said lots of sodium nitrate and to do and perform each, every and all of the terms, conditions and undertakings by it agreed to be performed; then and there demanded that the Secretary of War, pursuant to the terms of said auction sale, deliver to claimant the said lots of sodium nitrate at Middletown, Pa., Nitro, West Virginia, and Jacksonville, Tenn., and offered to hold itself ready and willing to do and perform all the terms, conditions and undertakings by it agreed to be performed until and including Monday, April 24, 1922.

62. That the Secretary of War refused claimant's said offers of performance and failed, refused and neglected to comply with its said demands stating his reason for his refusal that in his opinion the aforesaid prices of $25.00 and $22.50 respectively per ton were inadequate.

63. That from the 13th day of April, 1922, to and including the 24th day of April, 1922, this claimant held itself ready, able and willing, and offered to do and perform all the terms, conditions and undertakings by it agreed to be done or performed.

[fol. 16] 64. That thereafter the Secretary of War on or about June 1, 1922, returned to this claimant the amount deposited as a part payment as aforesaid, which it accepted without prejudice to any of its claims or rights against the Government of the United States.

65. On information and belief, the fair and reasonable market value of said sodium nitrate, at Middletown, Pa., on the 13th day of April, 1922, and to and including the 24th day of April, 1922, was $63.60 per ton, and the total value of the whole lot of 13,920 tons was $885,312; the fair and reasonable market value of said sodium nitrate, at Nitro, W. Va., on the 13th day of April, 1922, and to and including the 24th day of April, 1922, was $66.08 per ton, and the total value of the whole lot of 5,000 tons was $330,400; the fair and reasonable market value of said sodium nitrate, at Jacksonville, Tenn., on the 13th day of April, 1922, and to and including the 24th day of April, 1922, was $66.43 per ton, and the total value of the whole lot of 10,600 tons was $704,158.

66. Your petitioner represents that by reason of the facts hereinbefore stated it has been damaged and is entitled to be paid by the United States the sum of $1,208,370, against which there are no just credits or off-sets.

67. No other action than that recited hereinbefore has been had on this claim in the Congress of the United States, or by any of the Departments of the Government of the United States; no assignment or transfer of this claim, or any part thereof, or interest therein, has been made.

[fol. 17] 68. Your claimant has not in any way voluntarily aided, abetted or given encouragement to rebellion against the Government of the United States.

Walter John King, 11 Broadway, New York City, N. Y., Attorney for Claimant. John S. Wise, Jr., 20 Broad Street, New York City, N. Y., Of Counsel.

I, Walter John King, do state on oath that I am the Attorney of record in this case by virtue of a Power of Attorney granted me by the claimant herein, Erie Coal and Coke Corporation, and heretofore filed in this case; that I have read the foregoing Petition hereto attached and know the contents thereof, and that I am informed and believe that the facts therein stated are true, and upon such information and belief, I hereby verify said Petition.

Walter John King.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 14th day of March, 1923. Joshua W. Carr, Notary Public. My commission expires June 15, 1925.

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[fol. 18] CLAIMANT'S EXHIBIT A TO PETITION

Sodium Nitrate

(Approximately 40,000 Tons)

To be sold by auction Thursday, April 13th, 1922, 10 A. M., Eastern Time at Washington, D. C.

Chemicals

Quantities and Locations.—Middletown Ordnance Reserve Depot, Middletown, Pa., approximately 17,836 short tons Morgantown Gen. Ordnance Reserve Depot, South Amboy, N. J., approximately 1,234 short tons Nitro, W. Va., approximately 7,378 short tons Old Hickory Plant, Jacksonville, Tenn., approximately 13,554 short tons.

Terms of Sale and Other Information.—Inspection of the material is invited at the points indicated. It is to be sold "as is," "where is" and no refund or adjustment will be allowed after sale and award is made owing to material not fulfilling expectations as to quantity, quality, condition or delivery. The Government reserves the right to withdraw any lots from sale.

Terms.—10% deposit in the form of cash, certified check or U. S. Government Bonds at par will be required at the time bid is made. Opportunity will be offered for the purchase of lots as small as 100 tons or for the entire amount. Material will be loaded out and shipped by the purchaser at his own expense.

The sale will be conducted at Temporary Building No. 5, 20th & B Sts., N. W., Washington, D. C., on the date and at the time indicated above:

For further information address: Chairman Ordnance Salvage [fol. 19] Board, Munitions Bldg., Washington, D. C., War Department.

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CLAIMANT'S EXHIBIT B TO PETITION

Sale by Auction of Sodium Nitrate

10.00 a. m. April 13, 1922

Washington, D. C.

Quantity

There will be sold in this auction approximately 40,000 short tons of sodium nitrate located as follows:

Middletown Ord. Res. Depot, Middletown, Pa., a maximum of approximately 17,836 short tons.

It is proposed to sell the entire quantity held by the United States in storage at this place. The quantity shown by the books to have been stored at that place was 17,836 short tons, which has been reduced by shrinkage, handling, etc., to an indefinite amount which cannot be determined. The United States will not obligate itself to deliver definite quantities in excess of 15,000 tons, but proposes to enter into contracts for the sale of the entire quantity, including the indefinite balance beyond 15,000 tons.

Morgan Gen. Ord. Depot, So. Amboy, N. J., a maximum of approximately 1,190 short tons.

It is proposed to sell the entire quantity held by the United States in storage at this place. The quantity shown by the books to have [fol. 20] been stored at that place was 1,190 short tons, which has been reduced by shrinkage, handling, etc., to an indefinite amount which cannot be determined. The United States will not obligate itself to deliver definite quantities in excess of 1,000 tons, but proposes to enter into contracts for the sale of the entire quantity, including the indefinite balance beyond 1,000.

Nitro, West Virginia.

Out of the stocks held by the United States at this point, there will be sold 9,700 short tons.

Old Hickory Powder Plant, Jacksonville, Tenn.

There will be sold a sufficient quantity from the stocks held at this point to make up a total of approximately 40,000 tons. This will

involve the sale from Old Hickory of a minimum of approximately 11,274 short tons. This amount will be definitely fixed by estimation subsequent to the sale of the nitrate at the foregoing three places and prior to the sale of the nitrate at Old Hickory.

## Quality

The Government can make no guarantee or warranty as to chemical analysis, moisture content, condition as to crystallization, bags, etc., and under no consideration will a refund or adjustment be allowed after a sale and an award is made due to the material not coming up to expectations as to quality or condition. Failure to have inspected the nitrate offered for sale will not be considered as a basis for a claim against the United States.

[fol. 21]

## Condition

The following statement of condition of the nitrate offered for sale at this auction is furnished for the information of bidders. The United States, however, makes no guarantee or warranty as to the accuracy of this statement and no refund or adjustment will be allowed after the sale and an award is made due to variation of condition of the material from that furnished herewith.

Middletown.—Nitrate is stored in one warehouse, one-story, approximately 150 feet wide with a loading platform entirely along one side at car floor height and railroad trackage against this loading platform the entire length of the building. All the nitrate is in bags and 80% of the bags are believed to be in condition for reshipping.

Morgan.—The nitrate is stored in one building with the greater percentage in bags and two tons in boxes. All nitrate is partially set.

Nitro.—The material is stored in bulk, is slightly caked; can be broken out with a pick.

Old Hickory.—Eight hundred tons are stored in Bldgs. 86 and 87, and 2,000 tons in Bldgs. 11 and 12; nearly all originally bagged, but bags are now rotted to such an extent that nitrate is practically bulk, containing pieces of bags. Four thousand tons are in nitrate storehouse No. 6 originally stored in warehouse which was burned. This material was bagged, but bags are now partly burned. Balance in buildings Nos. 1 to 5 and No. 7. Nitrate bagged, with bags fairly good and nitrate in better condition than that in other buildings.

[fol. 22]

## Terms of the Sale

Material will be sold "as is," "where is" in its present condition, at the plants where located excepting the case of the nitrate located at the Old Hickory Powder Plant, which will be sold "as is," f. o. b. cars, placed Tennessee Central R. R., transwer near Jacksonville, Tenn.

All material sold in this sale must be entirely removed from the plants where located by the following dates set after each plant and

will be sold with the understanding that the purchaser will pay to the United States liquidated damages of 25c. per ton per month for all nitrate not removed on these dates:

Middletown Ord. Res. Depot—Aug. 31st.
Morgan Gen. Ord. Depot—May 30th.
Nitro, W. Va.—Aug. 1st.
Old Hickor Ord. Res. Depot—Aug. 31st.

In the event that the nitrate is loaded out for the purchaser by the United States, shipping instructions must be furnished in sufficient time to permit loading out by the above dates. The mere submission of shipping instructions in advance of the above dates will not operate to relieve the purchaser of liquidated damages for non-removal of nitrate. Bidders will be required and should come to the sale prepared to make a deposit in the form of cash or certified checks made payable to the Treasurer of the United States in the amount of 10% of the purchase price of nitrate purchased. (U. S. Government bonds at par value will be accepted in lieu thereof.) This deposit will be retained by the United States to apply against the last shipment of sodium nitrate on the contract with the purchaser. Acceptance by [fol. 23] the Government of any bid will not be final until the execution of a contract and bond and upon failure by the purchaser within ten days after notice of the acceptance of his bid to execute said contract the Government may withdraw such acceptance and make such disposition of said nitrate as it may desire free of any claim of purchaser in which event the 10% theretofore paid upon the acceptance of said bid shall be forfeited to the United States as liquidated damages.

Railroad weights at point of shipment will govern. The Government will not be responsible for any demurrage occurring after loading. At the time of loading a representative of the successful bidder must be present to verify weight, otherwise weights found by the Government representative will be accepted. Weights ascertained at the time of loading will be final in so far as the Government is concerned and no claims for shortage after this time will be allowed.

Where nitrate is shipped in bags an allowance of 7/10 of one per cent will be made for bagging.

Payment must be made for all material shipped by cash previous to shipment or a sight draft will be attached to the bill of lading.

## Contracts

Contracts will be prepared and administered for the United States by the Philadelphia District Office of the Ordnance Salvage Board. No assignment of the contract or the bill of sale of the property awarded will be permitted without written consent of the United States through the Ordinance Salvage Board.

[fol. 24] (A)

For Successful Bidders on Amounts Totaling 500 Tons or Less

The successful bidders will be required to enter into a contract with the Ordnance Salvage Board for faithful performance of all the terms and conditions of the sale and will be required to furnish a bond or approved surety guaranteeing such faithful performance in an amount satisfactory to the Chairman of the Ordnance Salvage Board, which shall be in an amount of not less than 25% of the purchase price.

(B)

For Successful Bidders on Amounts Totaling in Excess of 500 Tons

Purchaser will be required upon acceptance of his bid and before delivery of nitrate to enter into a written contract embodying the following terms, and to give a bond in double the amount of his bid, with surety acceptable to the Secretary of War, conditioned upon the faithful performance of the terms of said contract:

Government at its election may rescind said sale at any time before August 1, 1922, in which event the purchaser shall immediately, and not later than November 30, 1922, at his own expense, deliver to the Government f. o. b. cars, at Savanna Proving Ground, Illinois, sodium nitrate in equal quantity with that theretofore delivered by the Government to purchaser, and of the following specifications:

Not less than 96 per cent of net weight, to be refined nitrate of soda,

[fol. 25] and the Government shall return to purchaser all money theretofore received in payment for such nitrates, and relieve him from any obligation for further payments.

Loading

Middletown.—This material is to be sold "as is," "where is," to be loaded out by the purchaser. The Pennsylvania R. R. spots and removes cars at the nitrate warehouse without charge. There is at the establishment certain roller conveyor which, if not needed by the United States, may be used by the purchaser without charge in loading out the material, but no guarantee as to the quantity, kind, and condition of this material available for the use of the contractor is made.

The United States will, at the option of the purchaser, agree to load out the material purchased by him, charging the purchaser, in addition to the contract price for the nitrate, the actual cost, consisting of labor, material, and indirect expenses, required to perform this service.

Morgan.—This material is to be sold "as is," "where is," to be loaded out by the purchaser. The United States will spot and re-

move cars at the nitrate warehouse without cost to the purchaser. There is at the establishment certain roller conveyor which, if not needed by the United States, may be used by the purchaser without charge in loading out the material, but no guarantee as to the quantity, kind, and condition of this material available for the use of the contractor is made.

The United States will, at the option of the purchaser, agree to load out the material purchased by him, charging the purchaser, in addition to the contract price for the nitrate, the actual cost, consisting of labor, material, and indirect expenses, required to perform [fol. 26] this service.

Nitro.—This material is to be sold "as is," "where is," to be loaded out by the purchaser. This material is located in warehouses of the Charleston Industrial Corporation who have made the following offer to load out material for the purchaser "Charleston Industrial Corporation will contract with the purchaser of nitrate of soda to load all nitrate stored at Nitro in its present state for 90c. per short ton carload lots. This price includes switching charge. Any bagging or re-bagging will have to be negotiated separately."

Old Hickory.—This material will be sold "as is," f. o. b. cars, placed on the Tennessee Central Transfer near Jacksonville, Tenn., in short ton carload lots.

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CLAIMANT'S EXHIBIT C TO PETITION

Ordnance Dept.

War Department

Norfolk Quartermaster Intermediate Depot

Norfolk, Virginia

Remount Depot, Camp Meade, Md.

April 13, 1922.

Paddle No. 31.
Erie Coal & Coke Co., New York City.

Middletown:

| | |
|---|---|
| 12,920 tons Sodium Nitrate @ $25.00 | 348,000.00 |
| Deposit | 42,000.00 |
| | 306,000.00 |

[fol. 27] CLAIMANT'S EXHIBIT D TO PETITION

Ordnance Department

War Department

Norfolk Quartermaster Intermediate Depot

Norfolk, Virginia

Remount Depot, Camp Meade, Md.

April 13, 1922.

Paddle No. 31.
Erie Coal & Coke Company, New York City.

| | |
|---|---|
| Old Hickory: | |
| 10,600 Tons Sodium Nitrate @ $22.50 | 238,500 |
| Nitro: | |
| 5,000 Tons Sodium Nitrate @ $25.00 | 125,000 |
| | 363,500 |
| Deposit | 37,000 |
| | 326,500.00 |

[fol. 28] III. DEMURRER TO AMENDED PETITION—Filed March 26, 1923

Comes now the defendant, by the Attorney General, and demurs to the amended petition filed in the above-entitled cause on the ground that the same does not allege a cause of action against the United States.

Robert H. Lovett, Assistant Attorney General. P. M. Cox, Attorney. Dwight E. Rorer, Attorney.

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IV. ARGUMENT AND SUBMISSION OF DEMURRER—April 3, 1923

On April 3, 1923, the demurrer in this case was argued and submitted by Mr. Percy M. Cox, for the defendant, and by Mr. John S. Wise, for the plaintiff.

[fol. 29] V. OPINION OF THE COURT BY CAMPBELL, CH. J.—Entered April 16, 1923

CAMPBELL, *Chief Justice,* delivered the opinion of the court:

This case is before the court upon demurrer to the petition.

The plaintiff claims to have purchased three lots of sodium nitrate belonging to the Government, located at Middletown, Pennsylvania, Nitro, West Virginia, and Jacksonville, Tennessee, at an auction sale authorized by the Secretary of War. The petition alleges with care and detail the facts relied upon to establish the sale and purchase, and the plaintiff's willingness to comply with the advertised terms. The Secretary refused to approve the price bid for the property or to enter into contract for its delivery. It is averred that the Secretary of War caused to be circulated an advertisement of a public sale, at auction, of approximately 40,000 tons of sodium nitrate, located at the three places mentioned, upon terms stated in the advertisement, which is made Exhibit B to the petition. This Exhibit B purports to fix the time and place of the proposed "sale by auction," with a description of the lots of nitrate, stating in general terms its quality, with a reservation that the Government did not guarantee the quality, and, under a heading of "terms of sale," stating that the material would be sold "as is" "where is" in its present condition at the several plants. It was required that a purchaser make a deposit in cash or United States bonds of ten per cent of his bid, which would be "retained by the United States to apply against the last shipment of the sodium nitrate on the contract with the purchaser." Distinguishing between purchases of 500 tons or less and those in excess of 500 tons it is stated in Exhibit B that in the latter case the purchaser would be required "upon acceptance of his bid and before delivery of nitrate to enter into a written contract embodying" certain terms, and to give bond in double amount of his bid, "with surety acceptable to the Secretary of War," conditioned upon the faithful performance of the contract. A clause appearing in this exhibit and dwelt on in argument is as follows:

"Acceptance by the Government of any bid will not be final until the execution of a contract and bond, and upon failure by the purchaser within ten days after notice of the acceptance of his bid to execute said contract the Government may withdraw such acceptance and make such disposition of said nitrate as it may desire free of any claim of purchaser in which event the 10% theretofore paid [fol. 30] upon the acceptance of said bid shall be forfeited to the United States as liquidated damages."

It is averred that "the Secretary of War, by Robert Fox, his duly appointed auctioneer, did offer for sale as a part of the sodium nitrate so advertised for sale," one lot of 13,920 short tons located at Middletown; that plaintiff bid for the same "upon the terms and conditions offered in the circular advertisement of auction sale" the sum of $25 per ton; that this was the highest bid for this lot, and that "the same was then and there knocked down and sold to this claimant at the said price, upon the terms and conditions set

forth" in Exhibit B. The plaintiff made the ten per cent deposit, and by its duly authorized agent called upon the Secretary of War prepared to enter into the contemplated contract, but that official refused to make the contract and declared the price inadequate. As to the other two lots of nitrate the petition makes similar averments of purchase at said sale, and avers the deposit of the required ten per cent, the offer to enter into contracts and the Secretary's refusal, as already stated.

The plaintiff therefore claims that it became the purchaser at the alleged auction sale of the three lots of sodium nitrate; that it purchased one lot of 13,920 tons at $25 per ton, which on the date of sale, and to and including the day of the rejection of its bid, was of the fair market value of $63.60 per ton; another lot of 5,000 tons at $25 per ton, which on these dates was of the fair market value of $66.08 per ton; and the third lot of 10,600 tons at $22.50 per ton, which was of the fair market value of $66.43 per ton. The aggregate amount of its bids was $711,500, and the aggregate amount at the stated fair market value of the nitrate was $1,919,870. The difference between these sums, or $1,208,370, the plaintiff claims it is entitled to recover in this suit.

The law under which plaintiff claims the Secretary acted in authorizing the auction sale is a proviso in the act of July 11, 1919, making appropriations for the Army, 41 Stat. 105, reading as follows:

"Provided further, That in addition to the delivery of the property heretofore authorized to be delivered to the Public Health Service, the Department of Agriculture, and the Post Office Department of the Government, the Secretary of War be, and he is hereby, authorized to sell any surplus supplies, including motor trucks and automobiles now owned by and in the possession of the Government for the use of the War Department to any State or municipal subdivision thereof, or to any corporation or individual upon such terms as may be deemed best."

There were several statutes purporting to regulate sales of materials and products acquired before or during the war. There were also several enactments relating peculiarly to nitrates. The national defense act of June 3, 1916, 39 Stat. 215, authorized the President to construct plants for the production of nitrates and other products for munitions of war and useful in the manufacture of fertilizers, and provided that the products of such plants should be used by him for military and naval purposes "to the extent that he may deem necessary, and any surplus which he shall determine is not required shall be sold and disposed of by him under such regulations as he [fol. 31] may prescribe." Section 27 of the act of August 10, 1917, 40 Stat. 287, authorized the President to procure, or aid in procuring, stocks of nitrate of soda found to be necessary and available for increasing agricultural production during the years 1917 and 1918 and to make such regulations as he might deem proper to carry out that purpose. This was extended for the purposes named to the duration of the war by the urgent deficiencies act of October 1, 1918, making appropriations for the Department of Agriculture, 40 Stat. 1007; the moneys received for or in connection with the disposi-

tion of nitrate of soda pursuant to section 27 above mentioned were made available as a revolving fund to be used at the discretion of the President for extending the operation of that section, and provided that nothing in this last act should be construed as prohibiting the sale or disposal of nitrates remaining on hand at the time of the termination of the war. The prime purpose of producing these nitrates, so far as authorized by the national defense act, may have been for the use of the Army and Naval establishments, but, coupled closely with that purpose in this act and an intention running through the other acts mentioned, was that sodium nitrate was to be made or procured to aid in agricultural production. This is shown clearly by the joint resolution of April 23, 1920, 41 Stat. 573, whereby the Secretary of War was authorized to sell for cash "at the prevailing market price at the time of the sale" 100,000 tons of nitrate of soda, then held as a reserve supply of the War Department, the authorized sale to be made to users and distributors and in quantities of not exceeding 100 tons to any one purchaser.

Certain statutes had authorized the delivery of property by the Secretary of War to three other departments, as follows: By the act of March 3, 1919, 40 Stat. 1303, the Secretary of War was directed to transfer, without charge, for the use of the Public Health Service such hospital furniture and equipment, including hospital and medical supplies, motor trucks and other vehicles, not required by the War Department, "as may be required by the Public Health Service for its hospitals." By the act of February 28, 1919, making appropriations for the Post Office Department, 40 Stat. 1194, the Secretary of War and the Secretary of the Navy were directed to deliver to the Postmaster General upon his request and as provided in the act such aeroplane machines, supplies, equipment, and parts as were serviceable and available for "the aeroplane mail service," the same to be out of any equipment on hand or under construction. Section 7 of this same act, 40 Stat. 1201, authorized the Secretary of War in his discretion to transfer to the Secretary of Agriculture "all available war material, equipment, and supplies not needed for the purposes of the War Department, but suitable for use in the improvement of highways," and their distribution among the highway departments of the several States. It is to these provisions in the two acts mentioned that the proviso in the act of July 11 refers when it says that "in addition" to the delivery of the property to the Public Health Service, the Department of Agriculture, and the Post Office Department, the Secretary of War was authorized to sell "any surplus supplies, including motor trucks and automobiles" in possession of the Government, "for the use of the War Department," to any State or person upon such terms as may be deemed best. By the [fol. 32] act of March 15, 1920, 41 Stat. 530, the transfer of certain surplus motor-propelled vehicles, equipment, and material was again authorized, that to be transferred to the Department of Agriculture being more specifically named, and all in accordance with the act of February 28, 1919, already mentioned. This act of March 15 provides that the proviso in the act of July 11 now under consideration was not to be construed as amended or repealed by this act, except as to the transfer of those articles specifically named to be trans-

ferred to the Department of Agriculture. This act accentuates the fact that the supplies which the act of July 11 authorized to be sold by the Secretary of War were surplus supplies held for the use of the War Department.

There were other acts authorizing sales of war supplies and other materials. The act of May 10, 1918, 40 Stat. 548, empowered the President during the existing emergency, in his discretion and upon such terms as he should deem expedient, through the head of any executive department, to sell any supplies, materials, equipment or other property "heretofore or hereafter acquired by the United States in connection with, or incidental to, the prosecution of the war." This was followed by the act of July 9, 1918, 40 Stat. 850, which empowered the President, through the head of any executive department, to sell "upon such terms as the head of such department shall deem expedient * * * any war supplies, material, and equipment, and any by-products thereof, and any buildings," etc., acquired since April 6, 1917.

It is not to be presumed that Congress intended by the act of July 11 to take away from the President the power of disposition authorized by the act of July 9, 1918, and in view of these statutes, and especially of the legislation addressed peculiarly to the production and disposition of nitrates, it is open to serious question whether the act of July 11 contemplated the sale of sodium nitrate under the general designation of "surplus supplies" for the use of the War Department referred to in the act. If it authorized sales of nitrate by the Secretary upon such terms as he might deem best, including sales at auction, it is strange that by a joint resolution subsequently passed it was deemed necessary to authorize a sale of 100,000 tons of the reserve supply at the stated market price and in limited quantities to each purchaser. That the joint resolution was a limitation on the authority conferred by the act of July 11 we think there can be no question if it were conceded that the act ever authorized a sale of sodium nitrate.

But in the view we take of this case it is not necessary to dwell upon the distinction between the several acts or to go to the extent of holding that the act of July 11 did not authorize a sale of the nitrate in question.

The plaintiff contends that the sale was an auction sale, as the term is generally understood, and that when the auctioneer's hammer fell on its bids they constituted acceptances by the United States, and completed binding contracts of sale, passing title to plaintiff. It may be conceded that at an ordinary auction sale the rule as stated by plaintiff generally prevails that "as soon as the hammer falls" the bargain is considered as concluded. But in sales under a statute such [fol. 33] as we are considering or in the absence of statutory authority with appropriate regulations governing the same, a sale of Government property is not effected by "the fall of the hammer." The applicable rule in such cases is more analogous to that governing judicial sales than to auction sales where the property is knocked down by an auctioneer to the highest bidder. At a judicial sale, though conducted to all appearances as an auction, at public outcry the bid is in legal effect only an offer to take the property at the price

bid, and the acceptance or rejection of that offer is within the equitable discretion of the court. Such a sale is not final, nor can the purchaser have a legal title to the property he means to buy and has bid for until the sale is confirmed. Camden v. Mayhew, 129 U. S. 73, 82; Nalle v. Young, 160 U. S., 624, 637; Ballentyne v. Smith, 205 U. S., 285, 290. The sale in question was not a judicial sale, but the only authority for it must be found in the act of Congress under which the Secretary proceeded. The statutes mentioned, which purport to authorize sales by the Secretary, repose a power and authority in the exercise of which judgment and discretion must be used. He can say when a sale shall be made and pass upon the sufficiency of the price. It may be conceded that the method of securing bids is determinable by him. But an auctioneer has no such power, and is not the person in whom the statute confides authority. The Secretary may not thus divest himself of it. The sale, if such it may be called, was not final, and no title passed until the bid (or the contemplated contract) was finally approved by the official who lawfully represented the Government, and in whom was vested judgment and discretion to make a sale. The most that can be claimed for the bids at the alleged auction sale is that they were proposals which the Secretary could accept, and until they were duly accepted by him there was no approval of them, and consequently no sale.

There are statutes and appropriate regulations affecting sales of Government property at auction. See Secs. 1241, 1541, Army Regulations (1917), 680, 710. These statutes are strictly construed. Cooper's case, 1 C. Cls., 85; Steele case, 19 C. Cls., 181; 113 U. S., 128. In the last-named case this court held that where the act provided for a public sale an attempted private sale was void, saying that when a statute directs a public officer to do a certain thing in a certain way it is a prohibition of his doing it in any other way. The Supreme Court affirming the judgment held that the appellant was chargeable with knowledge of the fact that the sale was illegal. In the instant case there was no statutory direction to sell at public auction, and authority to make such a sale binding upon the Government at the fall of the auctioneer's hammer can not be implied. The Secretary of War evidently did not deem the bid at auction or the knocking down of the property by the auctioneer to have concluded the matter. He did not proceed upon the theory of sale which plaintiff insists upon, and on the contrary he refused to treat it as a consummated transaction. The advertisement of the sale, we think, notified persons submitting bids that they were subject to approval. And if the printed notice had been less definite the law itself was a sufficient notice of its terms and of the powers conferred by it. [fol. 34] Everyone must take notice of the extent of authority conferred by law upon a person acting in an official capacity. Different rules prevail in respect to the acts and declarations of public agents from those which ordinarily govern in the case of mere private agents. See Whiteside case, 93 U. S., 247.

The demurrer to the petition should be sustained and the petition dismissed. And it is so ordered.

Graham, Judge; Hay, Judge; Downey, Judge; and Booth, Judge, concur.

[fol. 35] VI. JUDGMENT OF THE COURT—Filed April 16, 1923

At a Court of Claims held in the City of Washington on the Sixteenth day of April, A. D., 1923, judgment was ordered to be entered as follows:

This case was submitted upon the defendant's demurrer to the plaintiff's amended petition, on consideration whereof the court is of the opinion that the demurrer is well taken.

It is therefore ordered, adjudged and decreed that the defendant's said demurrer to the plaintiff's amended petition be sustained, and that the petition be and the same is hereby dismissed.

By the Court.

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VII. PLAINTIFF'S APPLICATION FOR APPEAL—Filed May 9, 1923

From the judgment rendered in the above-entitled cause on the 16th day of April, 1923, in favor of the defendant, the claimant, by its attorney, on the 8th day of May, 1923, makes application for and gives notice of an appeal to the Supreme Court of the United States.

Walter John King, Attorney for Claimant.

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VIII. ORDER OF COURT ALLOWING APPEAL—Filed May 21, 1923

It is ordered by the court that the plaintiff's application for appeal be and the same is allowed. By the Court.

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[fol. 36] CLERK'S CERTIFICATE

[Title omitted]

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case on demurrer; of the opeinion of the court by Campbell, Ch. J.; of the judgment of the court; of the plaintiff's application for appeal to the Supreme Court of the United States, and of the order of the court allowing same.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Twenty-first day of May, A. D., 1923.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of the Court of Claims.)

Endorsed on cover: File No. 29,659. Court of Claims. Term No. 351. Erie Coal & Coke Corporation, appellant, vs. The United States. Filed June 2, 1923. File No. 29,659.

FEB 3 19

# Supreme Court of the United States

October Term, 1938

No. [redacted]

ERIE COAL & COKE CORPORATION,
*Appellant,*

*against*

THE UNITED STATES.

Appeal From the Court of Claims.

# BRIEF FOR APPELLANT

WALTHER JOHN KING,
*Attorney for Appellant,*
26 West 44th Street,
New York, N. Y.

James E. Wise, Jr.,
*of Counsel.*

Frank, Inc., 135 William Street, New York City

# Supreme Court of the United States

**October Term, 1923.**

[No. 351]

ERIE COAL & COKE CORPORATION,
*Appellant,*
*against*
THE UNITED STATES.

## *APPEAL FROM THE COURT OF CLAIMS.*

## *BRIEF FOR APPELLANT.*

This is an appeal from a judgment of the Court of Claims sustaining the demurrer of the Government to the appellant's amended petition and dismissing the petition.

The petition herein was filed in the Court of Claims February 26th and the amended petition March 14, 1923. The demurrer of the Government was filed March 26th. The case was argued and submitted April 3rd. April 16, 1923, the opinion of the Court of Claims (p. 17 *et seq.*) was filed and the judgment of the Court was that day entered (p. 22).

### *Statement.*

The petitioner in this case alleges in substance that in the exercise of the authority and discretion vested in him by the Act of July 11, 1919 (41 Stat. L., 105), conferring the right, power and authority to sell any surplus supplies in the possession of the War Department to any corporation or person upon such terms as to him

might seem best, the Secretary of War caused to be published and circulated an advertisement for the sale, at public auction, of approximately 40,000 tons of sodium nitrate, located at certain designated Ordinance Reserve Depots; that the Secretary, by Robert Fox, his duly appointed auctioneer, offered these lots of sodium nitrate located at these places; that the sale was largely attended by more than one hundred prospective bidders and interested persons; that the sodium nitrate was surplus material in possession of the Government for the use of the War Department; that the appellant bid an aggregate of $711,500 for three lots; that the appellant was the highest bidder at this auction sale for these three lots and the same was knocked down and sold to appellant for this sum upon the terms and conditions in the circular advertisement of auction sale (Appellant's Ex. B, p. 11); that pursuant to the advertised terms of sale the appellant deposited with the Ordinance Department of the War Department, United States bonds and certificates of bank deposit for more than 10 per cent. of the bid price; that its deposits were accepted as part payments and Government receipts issued to it therefor; that plaintiff held itself ready, able and willing to perform all the terms and conditions and undertakings by it agreed to be performed and offered so to perform, and demanded that the Secretary of War sign and enter into a written agreement of sale in accordance with the terms set forth in the notice and conditions of sale (Ex. B); that the Secretary of War refused claimant's said offer of performance and failed, refused and neglected to comply with its said demands stating his reason for his refusal that in his opinion the aforesaid price of $25 per ton for said sodium nitrate was inadequate; that after the Secretary of War had thus declined to execute a written contract, the Government bonds and certificates of bank deposit which had been deposited with the Ordinance Department at the time the bids

were made were returned to and accepted by plaintiff without prejudice to any of its claims or rights against the Government of the United States.

It alleges the fair market value of the sodium nitrate thus purchased and prays damages for the difference between the bid price and the market value in the sum of $1,208,370.

It states the usual several formal allegations of loyalty, etc.

The Government demurred on the ground that the petition did not allege a cause of action against the United States, thereby admitting all these allegations of the petition.

The Court below sustained the demurrer and directed and entered judgment finally dismissing the petition.

## POINT I.

**The Act of July 11, 1919 (41 Stat. L. 105) conferred upon the Secretary of War, authority to sell sodium nitrate at public auction.**

The opinion of the Court of Claims intimates that the Act of July 11, 1919 (41 U. S. Statutes), relied upon by the appellant, did not authorize the Secretary of War to sell the sodium nitrate which the petitioner purchased at public auction. The act reads as follows:

> "The Secretary of War be, and he is hereby authorized to sell any surplus supplies including motor trucks and automobiles now owned by and in the possession of the Government for the use of the War Department to any state or municipal subdivision thereof, or to any corporation or individual upon such terms as may be deemed best."

The petition alleges, and the Government's demurrer admits, that the sodium nitrate was "surplus supplies in possession of the Government for the use of the War Department" (Petition, p. 1).

This act of July 11, 1919, is commonly known as the third enabling act, and is the authority under which the Secretary of War has disposed of millions of dollars worth of surplus supplies, both by sealed bid and by public auction. Its language leaves to the Secretary the right in his discretion to determine the method of sale. The language is so broad that it is inconceivable that there could be raised a question as to his authority to sell by public auction.

## POINT II.

**Title to property sold at public auction without reserve, passes with the fall of the auctioneer's hammer.**

That title passes with the fall of an auctioneer's hammer, is an elementary principle of law, now immemorial in English and American jurisprudence.

> "When the hammer of the auctioneer fell on the bids of the claimant they constituted acceptances by the defendant, completed binding contracts of sale and passed titles to plaintiff."
>
> *Paige* v. *Cave*, 3 T. R., 148;

and see

> Benjamin on Sales, 6th Ed. (1920), 86;
> Story on Sales, Section 461;
> 3 A. & E. Encylopedia Law, 2nd Ed., p. 501;
> *Blossom* v. *R. R.*, 3 Wall., 196, p. 206;
> *Goldberg* v. *Meyer*, 37 App. Cases, D. C., 282, S. C., under name *Goldberg* v. *Daniels*, 231 U. S., 218.

The opinion of the Court of Claims appears, however, to make an exception to this ancient doctrine in the case at bar. In the opinion of the Court below (p. 20), it is said:

> "It may be conceded that in an ordinary auction sale the rule as stated by plaintiff generally prevails that 'as soon as the hammer falls' the bargain is considered as concluded. But in sales under a statute such as we are considering, or in the absence of statutory authority with appropriate regulations governing the same, a sale of Government property is not affected by the 'fall of the hammer.'"

Not only is this new exception to well established doctrine expounded by the Court below without precedent or authority, but it is clearly opposed to another well established principle of law expounded by the same Court, as follows:

> "When the United States enters into a contract with a citizen the elementary principles of contractual relations govern. The instrument which evidences the reciprocal obligations of the parties thereto is in no wise exceptional, and no greater privileges are to be accorded the United States under the circumstances than accrue to individuals similarly situated" (BOOTH, *J.*).
>
> *American Lithographic Co.* v. *United States*, 57 Ct. Cl., 340, p. 351.

> "If it (the United States) comes down from its position of sovereignty and enters the domain of commerce, it submits itself to the laws that govern individuals there (*Cooke* v. *United States*, 91 U. S., 398)."
>
> *Purcell Envelope Co.* v. *United States*, 51 Ct. Cl., 211, aff'd 249 U. S., 313.

## POINT III.

**The sale as advertised and conducted, was a public auction without reserve.**

The appellant's petition has incorporated by reference the advertisement of sale (Exhibit A, p. 10) and the terms of sale (Exhibit B, p. 11), and it is to these that the opinion of the Court below refers, as follows:

> "The advertisement of sale, we think, notified persons submitting bids that they were subject to approval" (p. 21).

The attention of this Court is respectfully drawn to the two exhibits, A and B.

The advertisement and terms of sale contain not a single specific word upon the subject of any reservation of right of review or approval, and not even a remote suggestion of any reserved right of rejection.

It is respectfully submitted that after reading over these terms appellant was justified in concluding that it was attending an ordinary public auction; and that when the hammer fell upon its bids on three separate lots of sodium nitrate and its money was accepted and receipts given therefor, that it had purchased nitrate which it would receive from the Government. It is respectfully submitted that these terms are not capable of the strained interpretation placed upon them by the Court of Claims, and nowhere contain any provision which authorized or justified the Secretary of War to refuse to comply with the appellant's demands because in his opinion the prices bid were inadequate.

The Secretary had exercised his full measure of discretion under the statute when he publicly announced:

"SODIUM NITRATE
(APPROXIMATELY 40,000 TONS)
TO BE SOLD BY AUCTION, THURSDAY, APRIL
13TH, 1922, 10 A. M. EASTERN TIME
AT WASHINGTON, D. C."

(See Exhibit A, p. 10.)

It is true he could have withdrawn *lots*, or even called off the entire sale, but in that event there would have been no *purchaser* with rights to be violated. *If he intended to reserve a right to reject bids after acceptance the language would have to be unequivocal.*

So far from supporting the interpretation of the Court of Claims, the plain language of the advertisement and terms refutes everything stated in the opinion.

*Fairly construed, the advertisement and terms* (Exhibits A and B, pp. 10, 11) *substantiate the appellants cause of action.*

In the Court below the Government laid stress upon the following paragraph from the terms of sale, and it would appear that the opinion of the Court of Claims has been influenced by it:

> "Acceptance by the Government of any bid will not be final until the execution of a contract and bond and upon failure by the purchaser within ten days after notice of the acceptance of his bid to execute said contract the Government may withdraw such acceptance and make such disposition of said nitrate as it may desire free of any claim of purchaser in which event the 10% theretofore paid upon the acceptance of said bid shall be forfeited to the United States as liquidated damages" (p. 13).

[After the word "bond" in the first sentence of this language there is no comma. In respondent's brief below and in the opinion of the Court below this comma has been inserted.]

The meaning of the above stated sentence is elucidated by the preceding two sentences of the same paragraph, which read as follows:

> "Bidders will be required and should come to the sale prepared to make a deposit in the form of cash or certified checks made payable to the Treasurer of the United States in the amount of 10% of the purchase price of nitrate purchased. (U. S. Government bonds at par value will be accepted in lieu thereof.) This deposit will be retained by the United States to apply against the last shipment of sodium nitrate on the contract with the purchaser."

The appellant attended the sale, together with over one hundred other bidders (Petition, pp. 5, 1); on three separate lots of sodium nitrate the auctioneer's hammer fell upon its bids, and on each occasion it complied with the terms of sale and deposited the required 10%, and was given receipts (Exhibits C and D, pp. 15, 16).

These facts were before the Court of Claims, admitted by the demurrer, yet the opinion of the Court below states:

> "The most that can be claimed for the bids at the alleged auction sale is that they were proposals which the Secretary could accept, and until they were duly accepted by him there was no approval of them, and consequently no sale."

The appellant submits that even an interpretation replete with liberality toward the Government cannot be strained to justify such an opinion. But if it were possible to cast a doubt upon the meaning of the terms, the appellant would still be entitled to have them construed in its favor, under the well established rule that words and phrases of doubtful meaning should be construed against the party who composed them.

*But it is not necessary to indulge in strained interpretations to analyze the meaning and arrive at the clear intent of the terms of sale.*

Bidders were notified to "come to the sale prepared to make a deposit—in the amount of 10% of the purchase price of nitrate purchased" (p. 13). It would seem self-evident that the bidder, so depositing, had *purchased* nitrate. The next sentence then states, "This deposit will be retained by the United States to apply against the last shipment of sodium nitrate on the contract with the purchaser" (p. 13). It would now appear that not only had the bidder become a *purchaser*, but as a purchaser he had made a *part payment*. For this part payment the purchaser was properly given a receipt (Exhibits C and D) and the auction sale was over. The sale now being over, the appellant, who was one of the successful bidders, was a *purchaser* and held Government receipts for a *part payment* on its purchase.

It is respectfully submitted that this view of the appellant's status at the close of the auction sale on April 13th is the result of a fair and reasonable interpretation of the language used in the terms of sale and is completely upheld by the fact that *nowhere in the advertisement or terms of sale will there be found a provision for the return of a purchaser's 10% part payment.* The reason is obvious; the sale was intended to be, and actually was, an absolute and final auction sale without reserve.

It will be noted that the language of the terms quoted above and interpreted by the appellant, all precedes the sentence relied upon by the Government and the Court below, as authority for the rejection of the appellant's bids by the Secretary of War. This fact is important in determining the clear intent of the sentence under discussion, which reads as follows (p. 13):

> "Acceptance by the Government of any bid will not be final until the execution of a contract and bond and upon failure by the purchaser within ten days after notice of acceptance of his bid to execute said contract, the Government may withdraw such acceptance and make such disposition

of said nitrate as it may desire, free of any claim of purchaser in which event the 10% theretofore paid upon the acceptance of said bid shall be forfeited to the United States as liquidated damages."

It is obvious that the foregoing sentence (following, as it does the sentences previously quoted, the fair ininterpretation of which give to the appellant the status of a *purchaser* at the close of the sale), was merely intended to define the further obligations of the appellant as a *purchaser* and the rights of the Government if the *purchaser* defaulted in these obligations.

*It is admitted that the appellant made no default whatsoever in performing its obligations.*

Yet, the Secretary of War, after the purchase and sale, and after the appellant had made the required part payment, notified the appellant that its three bids were rejected.

It is respectfully submitted that to construe the sentence under discussion, as the Court below has done, is to distort and invert the language used.

The language of this sentence is not only a penal provision but it was prepared by the Government, and for both these reasons under the well-established doctrines of the law is to be strictly construed against the Government.

The appellant contends that its meaning is clear; that it was inserted to define a *purchaser's* obligation after the sale, and to provide a penalty for a default in that obligation; that this default was a condition precedent to a right that would arise in favor of the Government, *i. e.*, a right, not to reject the bid, but to "*withdraw*" such acceptance, "and make such disposition of said nitrate as it may desire free of any claim of purchaser in which event the 10% theretofore paid upon the acceptance of said bid shall be forfeited to the United States as liquidated damages;" that when right of the

Government "to withdraw such acceptance" was expressly limited in the terms to occur upon the happening of one specifically stated contingency, *i. e.*, "failure by the purchaser within ten days" to execute the contract, the Government is foreclosed by all the known doctrines of construction, from asserting the right of withdrawal in any other contingency.

In the Court below it was argued that the sentence now under discussion gave to the Secretary of War a final right of review and meant that the successful bidder had nothing whatever until the bid was accepted in a written contract. The argument is untenable. The sentence in plain words affirms the fact that an acceptance has already been made, and it is obvious that the first part was intended solely to set out what the purchaser had to do, *i. e.*, execute a "contract and bond." The use of the words "and bond" clearly shows that reference was made to the purchaser's obligation only.

To construe the language used in the sentence under discussion, contrary to the views of the appellant herein, impels a successful bidder at the sale into a situation truly anomalous and a status undefined in law. Such a bidder would be a purchaser, as defined in the Government's terms, yet owning nothing and having no right to complete his obligation and receive the goods for which he had partly paid. Neither could he change his mind without loss, because the Government had his money and might retain it as a penal forfeiture. And this is not all. The Government could sue him for its damages resulting from his failure to complete the transaction. Such an interpretation repudiates essential mutuality and is pregnant with injustice.

The argument as to the complexity of the contract with this appellant ill-befits the numerous publications pointing out how easy it is to buy from the War Department.

The Court below says the Secretary did not consider the sale complete. As showing the Department's view of auction sales, the Court will take notice of its official advertisements.

In one of its circulars, under bold caption "METHODS OF SALE—AUCTION," it states:

> "Every business man is familiar with all the methods of sale employed by the War Department in disposing of its surplus,"

and under another large caption "IT IS EASY TO BUY FROM THE WAR DEPARTMENT," it says:

> "There seems to be an idea in the minds of some, who have not participated in these sales of Army surplus, that buying from the War Department entails bother and uncertainty. Such a belief is erroneous. All offerings are catalogued in detail. Honest descriptions of quantities and qualities are given. Every facility is afforded for inspection before purchase. The terms of sale are simple, and purchase resembles nothing so much as an ordinary, everyday, 'over the counter' transaction.
>
> "Buying at these sales is placed on the democratic basis of an equal opportunity for all.
>
> "The auctioneer's hammer knows no favorites; the sanctity of the sealed bid is preserved inviolate, and the fixed price on individually sold articles is one price to all.
>
> "The various methods of sale, too, offer opportunities to purchase in a manner convenient to you."

Proceeding in this same circular, it advertises:

> "Accordingly, the War Department was ordered to dispose of its surplus materials, and this it is doing by auction sales, by sealed bid offerings, and by sales at fixed prices. Its selling campaign is unique in that the profits are all on the side of the purchaser. The quality of the

> materials offered and the democratic method of selling put the big advantage in the buyer's hands. He is enabled to take unusual profits, because the Government *must* sell."

Since *Paige* v. *Cave*, 3 T. R., 148, and even up through the advertisement of the War Department, it has been the doctrine that the auctioneer's hammer knew no favorites, and yet here, for some unknown reason the attempt is made to cancel the sale to this purchaser without apparently questioning any of the other sales.

And yet it is argued and held that language authorizing a withdrawal of acceptance of his bid and enforcement of a forfeiture against him in event of one specified default implies a reservation of a right to the Secretary to reject his bid at his discretion for any reason.

## POINT IV.

**The appellant, as a matter of law, is entitled to damages.**

The appellant insists that when the hammer fell upon its bids, a purchase and sale was made; that when its deposit was accepted, a part payment was made; that thereupon, having fully complied with all the terms, it and the Government were firmly bound to complete the transaction by the execution of a contract within ten days.

This obligation is clearly and definitely set forth in the terms of sale (Exhibit B, p. 14) as follows:

> "Purchaser will be required upon acceptance of his bid and before delivery of nitrate to enter into a written contract embodying the following terms, and to give a bond in double the amount of his bid, with surety acceptable to the Secretary of War, conditioned upon the faithful performance of the terms of said contract."

In the face of this language it is argued, and is held by the Court below, that the Government was not under an obligation to execute the contract. If the purchaser was required to execute the contract, it would seem too obvious for argument that the Government holding the purchaser's 10 per cent. part payment under a penal forfeiture provision, was likewise bound and required to execute the contract with the appellant.

It is admitted that the appellant was ready, willing, and able to enter into the contract, and that it duly demanded that the Secretary of War do likewise. The Secretary of War refused to execute the contract or to deliver the nitrate, and this failure and refusal is the gravamen of the appellant's cause of action.

That the appellant is entitled to damages under these circumstances seems clear under numerous decisions made or affirmed by this Court.

In *Garfielde* v. *United States*, 11 Ct. Cl., 592 (p. 601), it is said:

> "The petitioner brings this action to recover damages for non-fulfillment on the part of the defendants of the contract which he maintains was made with him by the Postmaster-General by the acceptance of his proposal. It has frequently been held that when a bid has thus been accepted and the bidder is ready, willing and able to perform his part of the engagement, the other party, accepting the bid and refusing to enter into a formal, written contract, is liable to the same extent as he would have been had the contract been written out in full and signed by both parties (*Adam's* case, 1 C. Cls. R., p. 192; *Mayer's* case, 5 Ct. Cls. R., p. 317; *Tayloe* v. *Merchants' Fire Insurance Company*, 9 How., 390; *Mactier's Admr.* v. *Frith*, 6 Wend., 103; *Pratt* v. *The Hudson River Railroad Company*, 21 N. Y. Court of Appeals, 305)."
>
> "The defendants are therefore liable in this action if the Postmaster-General had authority

under the law and regulations to accept, as he at first, did the claimant's bid. When once lawfully accepted the contract would become binding on both parties, and the action of the Postmaster-General afterward, in refusing to acknowledge it and to perform his engagements thereby made, would be wrongful, and the claimant would be entitled to damages."

Affirming the Court of Claims in the *Garfielde* case, 93 U. S., 242, this Court says (p. 244):

> "The Court of Claims holds that the proposal on the part of Garfielde and the acceptance of the proposal by the department, created a contract of the same force and effect as if a formal contract had been written out and signed by the parties. Many authorities are cited to sustain the proposition. We believe it to be sound, and that it should be so held in the present case."

This Court has further held:

> "It makes no difference that the contract was not formally signed or the bond formally approved, as counsel for the Government contends they should have been, both by the terms of the contract and by a statute of the United States (28 Stat., 279). Their formal execution, as we have seen, was not essential to the consummation of the contract. That was accomplished, as was decided in the *Garfielde* case, by the acceptance of the bid of the Envelope Company and the entry of the order awarding the contract to it."
>
> *Purcell Envelope Co.* v. *United States,* 249 U. S., 313, p. 329.

## POINT V.

**The judgment should be reversed and assessment of damages directed.**

Respectfully submitted,

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*To be argued by*
*John S. Wise, Jr., Esq.*

# Supreme Court of the United States

**October Term 1924.**

ERIE COAL & COKE CORPORATION,
*Appellant,*

*against*

THE UNITED STATES.

No. 78

APPEAL FROM THE COURT OF CLAIMS.

## *REPLY BRIEF FOR THE APPELLANT.*

When this case was before the Court of Claims the Attorney General relied principally upon Revised Statute Section 3744 as ground for the Government's demurrer. The point was discussed at length in the briefs of both sides and extensively argued orally. It will be noted that the opinion of the Court below completely ignored the defense, a fact which in itself would logically indicate that the subject did not make a serious impression. That the Court of Claims was of the opinion that the statute was inapplicable to the case at bar becomes more apparent by reference to the subsequent opinion rendered on March 17, 1924, in *Swift & Company* v. *The United States*, to which we will refer hereafter.

## POINT I.

**Revised Statute, Section 3744, cannot be relied upon to sustain the Government's demurrer.**

### A.

**The adjudicated facts in the case at bar are beyond the scope and clear intent of Revised Statute, Section 3744.**

When Congress enacted Revised Statute, Section 3744, it did not intend it to change or affect the substantive law of contracts. The intent was merely to regulate and prescribe the duties of the three secretaries for the purpose of preventing the perpetration of fraud upon the Government by its own officers. This is clearly indicated by the original title of the act:

> "An Act to prevent and punish fraud on the part of officers intrusted with the making of contracts for the Government."

The title of the act is properly to be considered. In *United States* v. *Fisher*, 2 Cranch, 358, 386, Chief Justice MARSHALL said:

> "Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration."

The statute under consideration was enacted on June 2, 1862, while the country was in the throes of civil war and the Government was purchasing military supplies and negotiating for construction work. This purpose of the act was clearly defined by Mr. Justice MILLER, speaking for this court in *Salomon* v. *United States*, 19 Wall.,

17, wherein he referred to the act as "The Act of 1862, requiring contracts for military supplies to be in writing * * * ." And in *United States* v. *New York and Porto Rico Steamship Company*, 239 U. S., 88, Mr. Justice HOLMES, in his opinion said:

> "The section originally was part of the Act of June 2, 1862, c. 93, 12 Stat., 411, and its purpose is manifested by the scope of the act and its title. It is called 'An Act to prevent and punish fraud on the part of officers intrusted with making of contracts for the government,' and this was recognized as the purpose in *Clark* v. *United States*, 95 U. S., 539, * * * ."
>
> "We see no reason for extending the implication of the Act beyond the evil that it seeks to prevent."

It is conceded that the statute is couched in broad terms and refers to "every contract," but the very use of this broad language makes it necessary to inquire into the legislative intent. This principle of statutory construction was adopted by this Court in *Church of the Holy Trinity* v. *United States*, 143 U. S., 457. In that case the statute under discussion was the Act of February 26, 1885, 23 Stat., 332, c. 164, which read as follows:

> "That from and after the passage of this Act it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States, its territories or the District of Columbia, under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or services of any kind in the United States, its territories, or the District of Columbia."

It would be difficult to compose language more comprehensive and conclusive in scope and general terms, yet this Court, after looking into the history, the title, and the intent of the Act, decided that the employment of a rector by the defendant did not come within the statute. In the course of its opinion through Mr. Justice BREWER this Court said:

> "It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other.
>
> "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.
>
> • • • • • • • • •
>
> "The construction invoked can not be accepted as correct. It is a case where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore can not be within the statute."

Applying the principles of statutory construction set out in the above stated opinion to the case at bar and the applicability thereto of Revised Statute, Section 3744, the adjudicated facts in the ~~respondent's~~ APPELLANT'S petition are clearly outside the statute.

The title of the act shows that it was designed to prevent and punish the perpetration of fraud upon the

Government by its own officers. The Secretary of War publicly advertised the auction sale and the ~~respondent~~ APPELLANT in public competition with over one hundred other bidders, representing the nitrate trade of the country, had three of its bids accepted by the fall of the hammer and the acceptance of its 10 per cent. deposit as a part payment on account of the last shipment. The published terms further stipulated that the ~~respondent~~ APPELLANT's 10 per cent. payment would be forfeited to the United States if the ~~respondent~~ APPELLANT did not execute a formal contract within ten days after notice of acceptance of its bid. It is clearly evident that the Secretary of War took every precaution to assure the execution of a formal contract and that when the sale was over, both parties were contractually bound to execute it. This precaution and the contractual relation resulting therefrom were the very opposite of the evil which the statute was designed to prevent.

The historical background of the statute also leads to the conclusion that it was not intended to apply to the case at bar. When the statute was passed in 1862, the Government was purchasing supplies and paying out money. And even then, Congress undertook to relieve the several departments of the necessity for formal contracts in cases of emergency (Revised Statute, Section 3709). In *Cobb* v. *United States*, 7 Ct. Cl., 470, it was held that Section 3744 was enacted with reference "to the ordinary business of the departments specified."

Sixty years after the enactment of Revised Statute, Section 3744, the termination of the World War found the War Department stocked with a huge amount of supplies and it became necessary to liquidate. In the words of the War Department pamphlet mentioned in our first brief, "The sudden cessation of hostilities found War Department Warehouses choked with more than two billion dollars worth of these high grade materials." This was the condition existing in the War Department

when on July 11, 1919, Congress passed the Act authorizing the Secretary of War to sell "any surplus supplies * * * upon such terms as may be deemed best." (The section is quoted in full on page 3 of our first brief.) In speaking of war legislation, Mr. Justice HOLMES, writing for this Court in *American Smelting Co.* v. *United States*, 259 U. S., 75, says the Acts are to be interpreted in the light of the conditions that brought them about. It would appear that Congress intended to give to the Secretary of War, broad business powers unrestrained by the narrow limitations upon the department's ordinary business. It must be admitted that the War Department has so construed and exercised the authority.

It is as illogical to pretend that the Act of July 11, 1919, is subject to the provisions of Revised Statute, Section 3744, as it would be to prosecute a modern surgeon under the old statute against blood-letting in the highway. The enabling Act of July 11, 1919, was clearly special legislation to meet the requirements of an abnormal condition existing in the War Department.

To hold that Section 3744 applies to the case at bar would lead to absurdities. This was the third test applied in *United States* v. *Church of the Holy Trinity* (*supra*).

Acting under the broad authority conferred upon him in the Act of July 11, 1919, the Secretary of War has adopted three methods of disposing of the two billion dollars' worth of surplus material, i. e., sealed bid, public auction and fixed price. Bearing in mind that in these transactions the Government has possession of the goods and is the recipient of money, and that the purchase, in the words of the War Department's advertising pamphlet quoted in our first brief, at page 12, "resembles nothing so much as an ordinary, every day, 'over the counter' transaction," it would appear that not only does

the publicity of the sale make it impossible to perpetrate a fraud upon the Government, but to require in these transactions a written formal contract "with the names of the parties at the end thereof," would in many instances impede the business of the department, discourage purchasers, and thwart the clear intent of Congress in passing the enabling Act.

That Congress in passing the enabling Act in the form of a proviso to the military appropriations bill of July 11, 1919 (41 Stat., 105), intended to clothe the War Department with authority to dispose of its billions of surplus as a huge mercantile corporation would act, free from the ordinary restraints pertaining to its customary routine transactions, there can be no doubt, when reference is had to contemporaneous debates which took place in Congress. An item of one million dollars was provided for in committee to support a Director of Sales who was to dispose of all the surplus stocks. The item was successfully attacked in the Committee of the Whole and the proviso now contained in the Act was inserted. It is the third of a series of statutes by Congress deemed necessary to enable the Government to handle the disposition of the unprecedented and enormous stock of war materials in this country and in Europe, mounting, not into mere millions, but into billions of dollars in value. The quality and purpose of this legislation, its meaning and its interpretation, is found in the debates of the Sixty-sixth Congress, First Session, Congressional Record, Part I, page 984, where the following colloquy occurred:

> "Mr. Dent: Is it not a fact that by consolidating this million dollar appropriation under this item in the head of the director of sales we are saving many more millions that would absolutely have to be expended by the Ordnance Department, by the Quartermaster's Department, by the Signal Corps, and every other branch of the service?

> Mr. Kahn: That is the idea, exactly, and I thank the gentleman for his statement. As a matter of fact, if we do not have this one consolidated division, that will dispose of these commodities, the very condition that the gentleman from Alabama (Mr. Dent) refers to would exist. These separate bureaus of the War Department and other departments would be called upon to engage in the business of selling their surplus stocks."

It was even suggested that foodstuffs could be sold through the Parcels Post, whereupon Mr. Kahn, chairman of the Military Appropriations Committee of the House, replied:

> "Mr. Chairman, the gentleman seems to think that the only question involved here is the sale of foodstuffs. That is only an incident. There are hundreds of items, as I stated; there are some hundreds of locomotive cranes; there are railroad cars, acids, chemicals, raw material, scrap, and all kinds of material to be sold."

It is impossible to read the debates in Congress and logically conclude that Congress intended to prevent the War Department from disposing of its enormous surplus stocks except by way of a formal written contract of the kind provided for in Revised Statute Section 3744.

**B.**

**Both parties were contractually bound to memorialize their agreement by a writing, but the agreement was none the less complete and neither Section 3744 of the Revised Statutes nor the default of the Government is a defence against the appellant's claim upon the clear agreement.**

It is an elementary principle of law that two contracting parties are firmly bound before the formal execution of a written contract. The rule has been crisply

stated by Lord Chancellor CRANWORTH in *Ridgway* v. *Wharton*, 6 H. of L. cases, 238, as follows:

> "If the parties have entered into an agreement, they are not the less bound by that agreement because they say we sent it to a solicitor to have it reduced to form."

The principle has been adopted by this Court in *Garfielde* v. *United States*, 93 U. S., 242, and *Purcell Envelope Co.* v. *United States*, 249 U. S., 313, 329, from both of which cases we have quoted in our first brief at pages 14 and 15.

The appellant contends that this elementary and salutary principle of law is not affected by Revised Statute Section 3744, and has withstood and survived the apparent rigor with which the statute has been applied.

In this connection the case of *Harvey* v. *United States*, 105 U. S., 671, is an illuminating authority because the Government there relied upon Section 3744. There was a formal contract, but the claimant asked reformation and the Government took the untenable position that under Section 3744 there was no contract at all except and until the formal written contract was executed. This Court reversed the Court of Claims and said at page 688:

> "The written bid in connection with the advertisement, and the acceptance of that bid, constituted the contract between the parties, so far as regards the question whether the contract prices embraced the cofferdam work. *Garfielde* v. *United States*, 93 U. S., 242; *Equitable Insurance Co.* v. *Hearne*, 20 Wall., 494. The written contract, in that respect, was intended by both parties to be merely a reduction to form of the statement as to work and prices contained in the bid."

It will be noted that the authority relied upon by this Court in the foregoing opinion was *Garfielde* v. *United*

*States* (*supra*), and it is significant that in the latter case, both this Court and the Court of Claims (11 Ct. Cl., 592) relied upon *Adam's Case,* 1 Ct. Cl., 192, which latter case was solely a determination of the applicability of Revised Statute 3744 to these classes of cases. In the *Adams* case (*supra*), the Court of Claims said:

> "The Act of June 2, 1862 (Revised Statute, Section 3744), requiring officers making contracts to sign at the end, make affidavit of their correctness, and file a copy of each of such contracts in the return office, has nothing to do with the case. The law does not make the doing of those things prerequisites to the validity of the contract. Nor would the failure of the officer to perform his duty in this respect affect the validity of the contract, either so far as the claimant or the United States is concerned. It would subject him to the penalties prescribed in the act for neglect or dereliction of duty; and, indeed, was intended as a better security to the United States against the fraud and collusion of their own officers."

It thus becomes apparent that this Court has adopted the principle that an agreement to memorialize is binding upon both parties and that the failure of one to perform entitles the other to damages (*Garfielde* v. *United States*, 93 U. S., 242). In *Purcel Envelope Co.* v. *United States*, 249 U. S., 313, page 329, this Court reaffirmed the principle, relying upon the *Garfielde* case, and said:

> "It makes no difference that the contract was not formally signed or the bond formally approved, as counsel for the Government contends they should have been, both by the terms of the contract and by a statute of the United States (28 Stat., 279). Their formal execution, as we have seen, was not essential to the consummation of the contract."

The appellant respectfully contends that the use of the language "both by the terms of the contract and by a statute of the United States," in the foregoing opinion, is peculiarly applicable to the case at bar and is a complete answer to the arguments of the Government in relying upon Revised Statute Section 3744.

Neither this Court nor the Court of Claims has ever upheld the Government's reliance upon Section 3744 in a case where, as in the case at bar, *there was an agreement to memorialize and the claimant was ready, willing and able to do so.* This Court has, however, in the *Harvey* case (*supra*) distinctly held that both parties were firmly bound before the execution of the formal contract. And, indeed, this is the only logical view to take, when it is considered that Section 3744 only makes it the duty of the Secretary of War, to memorialize "contracts made by him." The very purpose of the statute presupposes the existence of a binding contract. The facts that the published terms of sale (Appellant's Exhibit B) required a formal contract; that the appellant was ready, willing and able to execute it, and demanded that the Secretary of War execute it; that appellant was under a penal forfeiture of $79,000 requiring it to execute, are sufficient to distinguish the case at bar from every case relied upon by the Solicitor General or decided in favor of the Government by this Court or the Court of Claims.

## C.

**The appellants conceded performance deprives the Government of the defence under Revised Statute Section 3744.**

The appellant contends that Revised Statute Section 3744 has no applicability to Government auction sales of surplus war material sold pursuant to the enabling Act of July 11, 1919 (41 Stat., 105), which was special legis-

lation. But if this Court does not agree with such contention, it is respectfully submitted that the appellants conceded performance, avoids the effect of the statute according to well established principles uniformly advanced by this Court and the Court of Claims.

Before discussing these authorities, we wish to point out that in all prior cases the point in question has arisen where the claimant was the *seller* or had performed labor or services. This observation is important and lends added force to the contention that the conditions existing in the War Department in 1919 were unusual, and unforeseen to Congress fifty-seven years before, when Section 3744 was enacted.

***Clark* v. *United States*, 95 U. S., 539.**

This case was a pioneer in the construction of this statute, and involved a verbal contract for the Government's use of the claimant's vessel, and an agreement to arbitrate its value in case of loss, an event which actually happened. Clark was allowed only the actual hire of his vessel up to the time it was lost and was denied the arbitration value. In the course of its opinion this Court said:

> "'We do not mean to say that where a parol contract has been wholly or partially executed and performed on one side, the party performing will not be entitled to recover the fair value of his property or services."

***United States* v. *Andrews*, 207 U. S., 229.**

The contract was made by correspondence, and in considering the contention that the contract did not conform to the requirements of Section 3744, it was said:

> " * * * but it is settled that the invalidity of a contract because of the non-compliance with the

> section referred to is immaterial after the contract has been performed."

Reverting now to the case at bar, it appears that the appellant was not selling material to, or performing labor and services for, the Government, but on the contrary was *buying* material *from* the Government. Performance on its part called for making a part payment upon the fall of the hammer, the execution of a contract "before delivery of nitrate." It is conceded by the demurrer that the appellant made the required part payment, and tendered full performance in all the remaining obligations; that the Government itself prevented and refused full performance, although the appellant was at all times ready and able and demanded the right to proceed.

The default was solely and entirely on the Government's part, yet we find the serious allegations of performance set forth in the appellant's petition disposed of by the Solicitor General on page 10 of the Government's brief in the following cursory way:

> "Mr. Justice HOLMES then points out that the 'invalidity of the contract is immaterial after it has been performed,' *a principle not involved here.*" (Italics ours.)

Not only is it conceded by the Government's demurrer that the appellant performed insofar as it was permitted, but it is respectfully submitted that as a matter of law *the appellant is entitled to the benefits of full performance.* This contention is but an illustration of an elementary principle of law that a defendant by preventing, or refusing to permit, full performance by the plaintiff, can not subsequently take advantage of his own wrong. This court, in *United States* v. *Beehan,* 110 U. S., 338, has already applied the principle against the Government, and reaffirmed it in *Lovell* v. *St. Louis Mu-*

*tual Life Insurance Co.*, 111 U. S., 264, wherein Mr. Justice BRADLEY, speaking for this court, said:

> "Where one party to an executory contract prevents the performance of it, or puts it out of his own power to perform it, the other party may regard it as terminated and demand whatever damage he has sustained thereby. We had occasion to examine this subject in the recent case of *United States* v. *Beehan*, 110 U. S., 339, to which we refer. It is unnecessary to discuss it further here."

In the recent case of *Swift & Company* v. *The United States*, decided by the Court of Claims on March 17, 1924, after their decision in the case at bar, a very complete review is made of all the decisions of this court on the subject of Revised Statute, Section 3744, and the effect of performance is elaborately treated.

The opinion, which was unanimous, contains the following statement:

> "Some of the authorities cited justify the conclusion that a partial performance is sufficient for the purpose under consideration and if, so stated, it is of doubtful application, the doubt is removed when it is added that if one party partially perform and is ready and willing to complete performance but is prevented or induced therefrom by the other, the latter may not take advantage of failure to fully perform. Under the facts of this case it seems to us that for the purpose under discussion the plaintiff is entitled to the benefits of full performance, but there is another view of the matter leading to the same result."

The foregoing opinion of the Court of Claims is peculiarly applicable to the conceded allegations of performance in the case at bar, and would clearly indicate that the Court below was of the opinion that Section 3744 could not be used to sustain the Government's demurrer.

## D.

**The cases relied upon in the Government's brief are not in point.**

Before discussing the specific distinguishing features in the cases relied upon and cited in the Government's brief it should be observed that they are all distinguished from the case at bar by the fact that none of them involves:

1. The *sale* of goods by the Government;
2. A public auction;
3. Surplus war stocks;
4. Sale under special war legislation;
5. An agreement to memorialize;
6. A default *by the Government;*
7. Claimant bound by a penal forfeiture;
8. A claimant ready, willing and able and tendering performance.

*Clark* v. *United States*, 95 U. S., 539.

This was the first case involving Section 3744 to reach this Court and was decided over the strong dissenting opinion of Mr. Justice MILLER, with whom Justices FIELD and HUNT concurred. It has frequently been cited as authority for the broad statement that "the contract, not being in writing, is therefore void." It is respectfully submitted that the opinions of this Court in *Harvey* v. *United States*, 105 U. S., 671, and in *United States* v. *New York & Porto Rico Steamship Co.* (1915), 239 U. S., 88, not only limit the effect of the *Clark* case, but render it authority for nothing more than a ruling on the specific facts involved. It should also be observed that the oral agreement between Clark and the quartermaster included an understanding that *no written contract would be entered into* for the time being. This was a mutual and deliberate violation of the statute.

*South Boston Iron Co.* v. *United States,* 118 U. S., 37.

A consideration of the facts and opinion in this case discloses as pointed out in the opinion of the Court of Claims in *Swift & Company* v. *United States,* decided March 17, 1924, that it can hardly be construed as an authority on the subject of Section 3744. There was no advertisement by the Government or other call for proposals, but the claimant, apparently on his own initiative, submitted an offer to furnish boilers "as may be required" according to drawings and specifications which in fact were not then in existence, and the Navy Department's acceptance stated that "The specifications and drawings will be furnished as soon as possible." Within a few days the whole matter was abandoned by the department; and the claimant had neither performed any of the work nor been called on to do so. In the *Swift* case (*supra*) the Court of Claims clarifies the decision in the *South Boston Iron Works* case as follows:

> "The uncertainty as to what the plaintiff was to do was strongly urged by the defense in this court, and Judge RICHARDSON in his opinion cites the uncertainty by stating that 'If it should be held that these papers constitute valid contracts against the Government, it is not at all clear that they have been broken by the defendants.'"

That this Court was also of the opinion that the minds of the parties had never met, is evident from the following statement in its opinion:

> "We agree with the Court of Claims that the papers relied upon for that purpose are nothing more in law or in fact than the preliminary memoranda made by the parties for use in preparing a contract for execution in the form required by law."

*Monroe* v. *United States*, 184 U. S., 524.

The Solicitor General seems to place special emphasis upon this case at pages 6, 7 and 8 of the Government's brief. The point involved was clear and simple as pointed out by the Court of Claims in the *Swift & Company* case (*supra*). A written contract was actually entered into, and contained the provision: "This contract shall be subject to the approval of the Chief of Engineers of the United States Army," and this Court quite naturally held *the written contract* invalid because not so approved. In delivering the opinion of this Court, Mr. Justice McKenna said:

> "In other words, a final reviewing and approving judgment was given to the Chief of Engineers, and was given by a covenant so expressed as to constitute a condition precedent to the taking effect of the contract. If the covenant did not mean that it was idle."

Its distinction from the case at bar is patent and it surely is not authority for the Government's argument.

*St. Louis Hay & Grain Co.* v. *United States*, 191 U. S., 159.

The contract in this case was lacking in the formalities required by Section 3744, but was *executed*, not executory. The claimant itself raised the point that the contract was void, thereby hoping to collect for its hay on the basis of *quantum valebat* which exceeded the amount due him in *quantum meruit* on the contract. The case belongs to the class where no formal written contract was entered into, provided for, *or even contemplated*. This Court decided against the claimant on the theory that there was a closed transaction. The opinion supports the contention of the appellant in the case at bar, and the conclusions of the Court of Claims in the

*Swift & Company* case (*supra*) that performance takes a case out of the statute. In *United States* v. *Andrews*, 207 U. S., 229, the case under discussion is cited by this Court as authority for the following statement:

> "but it is settled that the invalidity of a contract because of the non-compliance with the section referred to is immaterial after the contract has been performed."
>
> *McLaughlin & Co.* v. *United States*, 37 Ct. Cl., 150.

In this case the claimant sued to recover damages occasioned by the Government's delay in executing the formal contract. The following quotation from the opinion of Mr. Justice Howry, not only shows the real point involved, but conclusively demonstrates that the facts were just the opposite of those in the case at bar:

> "They made no effort, however, to complete the preliminaries. It does not appear that any demand was made for the formal execution of the contract, or that any request was preferred by them to be permitted to proceed, or that they tendered any bond in advance of the time the matter was actually closed."
>
> *Gillespie's Case*, 47 Ct. Cl., 310.

This case likewise belongs to that class where no written formal contract was provided for, intended, or even contemplated. In other words, the Government official and the claimant deliberately violated the statute.

> *American Dredging Co.* v. *United States*, 49 Ct. Cl., 350.

This case stripped of its surplussage and dicta is nothing more than a decision that when a written contract provides a time for the completion of its performance the Court cannot extend the time to adjust delay in entering into the contract. The discussion of Section 3744 then indulged is entirely beside the question.

## POINT II.

### Answering the Government's several arguments beyond the Revised Statute.

#### (A)

#### "Notice of Acceptance."

In the second paragraph, on page 11, of the Government's brief, the following argument is resorted to:

> "The conditions of sale already set forth plainly contemplated not merely a written contract as required by law, but a more formal acceptance of the bid than the fall of the auctioneer's hammer. 'Acceptance by the Government of any bid' was not to be final until the execution of a contract and bond, which was to be executed within ten days after 'notice of the acceptance' of the bid, not ten days after the auctioneer had acted. The bid then tentatively accepted was to be submitted to the Secretary, and if accepted by him, the bidder was to be given ten days notice to execute the contract and bond. To hold that the action of the auctioneer was final would be to divest the Secretary of the responsibility and discretion conferred upon him by the statute."

This argument is based upon a misappropriation of the language of a clause appearing on page 13 of the record to purposes not intended and which are covered by a separate clause on page 14, to which no reference whatever is made. The terms of the contract provide:

> "Purchaser will be required upon acceptance of his bid and before a delivery of nitrate to enter into a written contract embodying the following terms, and to give a bond in double the amount of his bid, with surety acceptable to the Secretary of War, conditioned upon the faithful performance of the terms of said contract."

This language unequivocally refers to the acceptance of the bid which occurred upon the fall of the auctioneer's hammer. It does not provide that the contract shall be made ten days after notice of acceptance, as argued in the Government's brief above quoted (p. 11), but that the contract shall be put in writing and bond given upon the conditions specified, not within ten days after "notice of the acceptance" of the bid, as argued by the Government, but only "before delivery of nitrate".

The clause, on page 13 of the record, from which the Government's brief indulges the argument to which it resorts, is as follows:

> "Acceptance by the Government of any bid will not be final until the execution of a contract and bond and upon failure by the purchaser within ten days after notice of acceptance of his bid to execute said contract, the Government may withdraw such acceptance and make such disposition of said nitrate as it may desire, free of any claim of purchaser in which event the 10% theretofore paid upon the acceptance of said bid shall be forfeited to the United States as liquidated damages."

This is purely a penal forfeiture clause.

Only by absolute distortion of its language can it be construed as reserving to the Secretary of War a right to re-consider the acceptance effected upon the fall of the auctioneer's hammer, or right of rejection, such as is argued in the Government's brief.

This clause can only be fairly interpreted as conferring upon the Government the right, not to reject the bid, but to withdraw its acceptance in the single specified event that the "purchaser" shall fail to execute the requisite contract and bond "within ten days after notice of acceptance of his bid," in which event, the Government, after thus withdrawing "such acceptance" may "make such disposition of said nitrate as it may desire, free of any claim of *purchaser*, in which event the 10 per

cent. theretofore *paid upon the acceptance of said bid* shall be *forfeited* to the United States *as liquidated damages.*" There is nothing in this language to warrant the characterization of the bid as then "tentatively accepted," as argued by the Government, and there is nothing in either of these clauses from which it can be implied that such "tentatively accepted bid" was to be submitted to the Secretary, and, if accepted by him, the bidder shall be given ten days notice to execute the contract and bond, as argued in the Governments' brief, pages 11-12.

**(B)**

**The Government Option Clause.**

It is argued in respondent's brief, page 12, thus:

> "There is another consideration which should be noticed. One of the terms of sale which was to be incorporated into the contract was a provision that the Government, at its election might rescind the sale at any time before August 1, 1922, in which event the purchaser should immediately deliver to the Government sodium nitrate in equal quantity with that theretofore delivered by the Government to the purchaser.
>
> "Irrespective of any other considerations, this provision, in its practical effect, would give the Government the right to revoke, rescind or annul the sale—call it what you will—at any time.
>
> "From a practical standpoint, there would seem to be no difference between the reservation of a right in the Secretary of War to refuse to accept a bid and his right to accept the bid and in the next minute rescind the sale."

We respectfully submit this argument is absolutely fallacious and specious. That the contract, *if executed by the Government,* might have required this plaintiff upon call, to deliver an equal quantity of other nitrate, is not a justification for its refusal to perform its con-

tract of sale of the nitrate in question. Furthermore, the bid having been rejected for one specified reason, the Government will not be heard to attempt a new and entirely different justification:

*International Banking Corporation* v. *Irving National Bank* (U. S. D. C., N. Y.), 274 Fed., 122;

*Greenwood* v. *Munson* (C. C. A., 2nd Circuit), 273 Fed., 166;

*Goodman* v. *Purnell* (C. C. A., 2nd Cir.), 187 Fed. Rep., 90.

It is a curious conceit that by defaulting its undertakings the Government acquires a right which would mature by performance. The whole argument calls upon the Court to dispose of appellant's rights by speculating as to what might have happened in purely conjectural circumstances.

Furthermore, it is respectfully submitted that the clause under discussion would not have given the Government a right to cease delivering nitrate sold to the appellant, except insofar as the latter had not taken delivery thereof prior to November 30, 1922.

## (C)

### Adequacy of Price.

We venture that never before has this Court heard it suggested that the fall of a hammer at an auction sale without reservation impliedly reserved to the Government officer conducting the sale a right to reject the bid because of his subsequent conclusion that the price was inadequate.

The argument in the Government's brief, page 11, that an officer of the Government could hardly justify or

excuse his acts had he sold Government property worth over two million dollars for a little over seven hundred thousand dollars is entitled to no consideration or respect.

Had the Secretary of War desired, or intended, to reserve any such right of review as is advocated in the Government's brief, he would have adopted the sealed bid method of sale wherein the highest bid could have been considered at leisure, and then accepted or rejected or would have stated his reservation in his terms of sale. In either method a bid is but an offer and the bidder has nothing until his bid has been accepted, but in a public auction, such as in the case at bar, the acceptance is final on the fall of the hammer. The Court has so decided:

*Goldberg* v. *Daniels,* 37 App. C. D. C., 282; affirmed 231 U. S., 218;
*Blossom* v. *Milwaukee* R. R. Co., 3 Wall., 196-206.

The Court of Claims (Opinion, pp. 20-21) suggests a similarity between this sale and a judicial sale under direction of the Court.

The Government's brief accepts this suggestion and urges this sale should be so treated (p. 11).

The judicial sales referred to are held under well known and defined rules.

It might be proper to have a statute subjecting Government auctions to such a rule, but suffice it to say no such rule exists or has any application to these sales.

When in the exercise of the power and discretion conferred upon him by the Act of Congress, the Secretary of War determined upon an auction sale with stated terms, he had the right to stop the sale at any time before the fall of the hammer. After that all right of argument as to price was gone.

## (D)

### Opinion of the Attorney General.

The Government's brief (p. 5) argues the Secretary of War was counselled by the Attorney-General.

This argument fares ill when the facts are observed.

The sale was April 13, 1922.

The Secretary of War undertook to cancel it and refused to sign the contract within ten days.

In June he sought the advice of the Attorney-General and got this advice in January, 1923 (33 Op. A. G., 400). That opinion tallies but poorly with that of the Attorney-General in the matter of Calco Chemical Company, February 12, 1920.

## (E)

### Opinion of the Court of Claims.

In its opinion the Court of Claims takes the position that the auction was not a sale.

It says:

> "The statutes mentioned, which purport to authorize sales by the Secretary, repose a power and authority in the exercise of which judgment and discretion must be used. He can say when a sale shall be made and pass upon the sufficiency of the price. It may be conceded that the method of securing bids is determinable by him. But an auctioneer has no such power, and is not the person in whom the statute confides authority. The Secretary may not thus divest himself of it. The sale, if such it may be called, was not final, and no title passed until the bid (or the contemplated contract) was finally approved by the official who lawfully represented the Government, and in whom was

> vested judgment and discretion to make a sale. The most that can be claimed for the bids at the alleged auction sale is that they were proposals which the Secretary could accept, and until they were duly accepted by him there was no approval of them, and consequently no sale * * *.
>
> In the instant case there was no statutory direction to sell at public auction and authority to make such a sale binding upon the Government at the fall of the auctioneer's hammer cannot be implied. The Secretary of War evidently did not deem, the bid at auction or the knocking down of the property by the auctioneer to have concluded the matter. He did not proceed upon the theory of sale which plaintiff insists upon, and on the contrary he refused to treat it as a consummated transaction. The advertisement of the sale we think notified persons submitting bids that they were subject to approval. And if the printed notice had been less definite the law itself was a sufficient notice of its terms and of the powers conferred by it" (p. 21).

The Government's brief (p. 12) argues "to hold that the action of the auctioneer was final would be to divest the Secretary of the responsibility and discretion conferred upon him by the statute". The petition alleges, and the demurrer admits, that the Secretary of War, by his duly appointed auctioneer, sold the nitrate in question to the plaintiff-appellant.

To construe the transaction as a mere offer is to do violence to the language used in the terms of sale prepared and published by the Secretary. Being prepared by him these terms are to be strictly construed against him when they are uncertain but not to be substituted by new language to effect his change of purpose.

The statute under which the Secretary proceeded (Government's brief, p. 2) confers a discretion as liberal as language can express.

The Court of Claims concedes the statute confers discretion upon him as to when and by what method he will sell but undertakes to nevertheless deny his power to sell at auction.

This denial is inconsistent with the concession of authority to determine his method of sale.

The language of the statute quoted is too broad to be limited by implication or convenience to preclude an auction sale. It would require express language to make such a limitation.

It is against reason to assert that the Secretary has divested himself of the authority and discretion conferred by the statute in selling at public auction.

His discretion and authority were exercised when he ordered the public auction. We venture that the idea here expressed is without precedent in law.

The statements that the sale was not final but only a call for bids, and that the Secretary of War rightly so treated it is likewise novel.

This is a recourse of necessity. To sustain it is to ignore the meaning of all language used before the defense was asserted.

Such a conception cannot survive the reading of the caption of the public advertisement of the sale:

> "To be sold by auction, April 13th, 1922, 10 A. M. Eastern Time, at Washington, D. C."

If a sale was not intended, language has lost its meaning.

Calls for "tentative bids" were never advertised for in this language. The Court of Claims, however, proceeds with its statement:

> "The most that can be claimed for the bids at the alleged auction sale is that they were proposals which the Secretary could accept, and until they were duly accepted by him there was no approval of them, and consequently no sale."

True enough, this, as any other bid, effected no sale until it was accepted.

The Court then, ignoring the fact that the Secretary's admittedly duly appointed auctioneer accepted it for him, passed to the unpremised conclusion there was no sale.

Proceeding in the same manner it cites some irrelevant cases when on proper grounds other sales have been held void.

Without considering the extent of the authority conferred upon the Secretary by the statute under consideration, with its obvious purpose of defeating appellant's claim, it states that because there was no statutory direction for a public auction the "authority to make such a sale binding upon the Government at the fall of the auctioneer's hammer cannot be implied."

Like the former statement, this might be correct.

However, no implication of authority is sought here and the statement is not determinative in the case. The statute here was broad enough to convey the authority without implication, the language of the statute being so broad that any method of sale was so clearly authorized, a limitation would have to be clearly expressed.

Whether the Secretary of War deemed this a sale or not and what theory he proceeded upon seems to have been considered important by the Court, but we respectfully submit his views and decisions could not determine appellant's rights.

It is true he refused to "treat it as a consummated transaction," as stated by the Court, but, we submit, that is not reason or law for denial of appellant's rights under his contract.

The Court then announces some other facts that have no bearing upon appellant's claims. It says the advertisement notified bidders they were subject to approval. It says if the advertisement had not, the law notified them of the powers conferred by it.

This is all true. It is the basis of appellant's claim —not the ground for its rejection. The advertisement stated it was to be a sale at auction, and everybody knows a bid is not final until approved and accepted by the auctioneer.

The Court ignores all the language of the admitted terms of sale.

It does not even conclude there was no sale, it simply dismisses appellant's case.

The care with which the Court avoided any statement of the relevant admitted facts of the case and avoided any attempt to arrive at any conclusion of law upon the facts is amazing.

The Court ignored all the admitted facts of the terms of sale. It could not support its decision if it ventured to heed them.

If the terms of sale are read it is impossible to avoid the conclusion that there was a final sale. Let us look at some of the language used.

> "Bidders will be required and should come to the *sale* prepared to make a *deposit* in the form of cash or certified checks made payable to the Treasurer of the United States in the amount of 10% of the *purchase price* of nitrate *purchased.*" (Italics ours.)

There is no suggestion of tentative bidding or reviewing or reservation in that language. There is no use of the customary English expression of a call for tentative bid, that a bidder accompany his bid with a percentage of the bid to be returned by the seller in case the bid is not accepted.

There is nothing like that at this sale.

Understanding the meaning of a *sale* and a deposit on account of an accepted bid, and having thus intelligently and understandingly designated the deposit as a per-

centage of the "*purchase price* of nitrate *purchased*," the terms proceed with no suggestion of any possibility of any return of this deposit but with a provision thus:

> "This deposit will be retained by the United States to apply against the last shipment of sodium nitrate on the contract with the *purchaser*."

Not only must this purchaser take the whole amount for which his bid is accepted, but he must at all times be paid up 10 per cent ahead of the Government's deliveries of nitrate. Not only must he sign up a written contract to prove his trade, but if he fails to sign up this agreement within ten days after notice of acceptance, which notice he has on the fall of the hammer, his "*deposit of 10% of the purchase price of sodium nitrate purchased*" is forfeit.

Never until suit was commenced was it anywhere suggested there existed any implied reservation of a right to review and reject a bid for inadequacy.

The Court of Claims evolved this fiction out of pure imagination.

**(F)**

**No Allegation of Fraud or Bad Faith.**

The Government's brief concludes (p. 13):

> "There is no allegation that the Secretary acted fraudulently or in bad faith or from any unworthy motive."

The action being for damages for breach of contract, such allegations are not necessary. That is sufficient reason for omission of charges of fraud.

Bad faith may be read from the charges of wilful and deliberate refusal to perform the contract.

**(G)**

**In its opinion the Court below (p. 20) suggest that it may be that Congress did not intend to confer upon the Secretary of War any authority to sell sodium nitrate because by a prior act such authority had been given the President.**

If such a view were to be indulged it might lead to the result that the act under consideration gave the Secretary power to sell no surplus war materials notwithstanding the breadth of its language because the former acts referred to gave the President a general power to sell any materials he thought proper to sell.

This is all shown to have no bearing on the case, however, when reference is made to the language of the debates in Congress hereinbefore cited (*supra*, p. 8).

## POINT III.

**The judgment of the Court of Claims must be reversed and assessment of damages directed.**

From the foregoing discussion of the decision of the Court of Claims it will be seen that the Court has arrived at no conclusion of law hostile to appellant's claim.

It has stated that the bid of appellant was only an offer until accepted, but it has not found or decided it was not accepted.

It has stated the Secretary of War did not deem it a final transaction but it has not concluded he had any lawful right to not deem it a final transaction.

It has stated the notice of sale advised appellant his bid must be approved before a sale would be effected but it has not found that the bid was not approved. In short

it has dismissed the case without expressing any reason therefor.

This judgment must be reversed as a matter of law unless this Court upon the admitted allegations of the petition can arrive at a conclusion of law that the transaction did not constitute a sale.

That cannot be done without making a new contract for the parties. It is admitted that every act of a sale at auction without reserve was performed and payment on account of purchase price was accepted and retained by the Secretary of War about two months (Petition, par. 64, p. 9).

It is admitted the Secretary refused to complete the contract of sale by delivery only because he considered the price inadequate (Petition, par. 62, p. 9).

Respectfully submitted,

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# In the Supreme Court of the United States

OCTOBER TERM, 1924

ERIE COAL AND COKE CORPORATION, appellant
*v.*
THE UNITED STATES
No. 78

*APPEAL FROM THE COURT OF CLAIMS*

## BRIEF FOR THE UNITED STATES

The plaintiff (appellant) brought suit in the Court of Claims to recover $1,208,370.00 as damages for alleged breach of contract by the War Department in refusing to deliver 29,500 tons of sodium nitrate, which it claimed to have purchased at an auction sale conducted by that Department. The aggregate amount of its bids was $711,500.00, and the fair market value of the nitrate, as alleged in the petition, was $1,919,870.00, the difference being the amount which the plaintiff claimed it was entitled to recover.

The plaintiff's bid was, therefore, about 37 per cent of the fair market value of the property, and the Secretary of War refused to carry out the sale, on the ground that the price was inadequate.

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The Court of Claims sustained the demurrer of the United States, on the ground that the petition did not allege a cause of action, and entered judgment dismissing the petition.

THE FACTS

It is alleged in the petition that the sale was made pursuant to the Army Appropriation Act (Act of July 11, 1919, c. 8, 41 Stat. 104, 105). The first paragraph of that Act provided that—

> in addition to the delivery of the property heretofore authorized to be delivered to the Public Health Service, the Department of Agriculture and the Post Office Department of the Government, the Secretary of War be, and he is hereby, authorized to sell any surplus supplies including motor trucks and automobiles now owned by and in the possession of the Government for the use of the War Department to any State or municipal subdivision thereof, or to any corporation or individual upon such terms as may be deemed best.

The petition sets forth separate causes of action for separate lots of the nitrate located at different places. They are all based upon substantially the same allegations and may be summarized briefly as follows:

That the Secretary of War caused to be published and circulated an advertisement (Claimant's Exhibit A, p. 10) for the sale at public auction on April 13, 1922, at the War Department in Washington, of

40,000 tons of sodium nitrate. At the time and place appointed, the nitrate was offered for sale, and the plaintiff bid for three lots, bidding $25 per ton for two of the lots and $22.50 per ton for the third. The plaintiff was the highest bidder, and the auctioneer knocked down the goods to the Plaintiff.

Plaintiff thereupon deposited with the Ordnance Department bonds and certificate of deposit of the value of more than 10 per cent of the price paid; that the Ordnance Department accepted such deposits; that the plaintiff held itself ready and willing to do and perform all the terms, conditions, and undertakings by it agreed to be performed, and demanded that the Secretary of War sign and enter into a written contract to sell pursuant to the terms set forth in the circular (Claimant's Exhibit B, page 11); that the Secretary of War refused to execute such written agreement upon the ground that the prices paid were inadequate; that the bonds and certificate of deposit were returned to and accepted by the plaintiff without prejudice to any of its claims or rights against the United States, and that the difference between the fair market value of the sodium nitrate and the price bid was the sum of $1,208,370.00.

It was provided in the terms and conditions of the sale (Plaintiff's Exhibit B, page 13) that—

> Acceptance by the Government of any bid will not be final until the execution of a contract and bond and upon failure by the purchaser within ten days after notice of the acceptance of his bid to execute said contract

the Government may withdraw such acceptance and make such disposition of said nitrate as it may desire, etc.

* * * * *

Contracts will be prepared and administered for the United States by the Philadelphia District Office of the Ordnance Salvage Board. No assignment of the contract or the bill of sale of the property awarded will be permitted without written consent of the United States through the Ordnance Salvage Board.

* * * * *

Purchaser will be required upon acceptance of his bid and before delivery of nitrate to enter into a written contract embodying the following terms, and to give a bond in double the amount of his bid, with surety acceptable to the Secretary of War, conditioned upon the faithful performance of the terms of said contract.

Government at its election may rescind said sale at any time before August 1, 1922, in which event the purchaser shall immediately, and not later than November 30, 1922, at his own expense, deliver to the Government f. o. b. cars, at Savanna Proving Grounds, Illinois, sodium nitrate in equal quantity with that theretofore delivered by the Government to purchaser, and of the following specifications: * * * and the Government shall return to purchaser all money theretofore received in payment for such nitrates, and relieve him from any obligation for further payments.

## ARGUMENT

### There was no binding contract between the appellant and the United States

The conditions set forth in the advertisement and in the circular (Claimant's Exhibit B) show clearly that under the announced plan of sale no binding obligation was incurred by the Government until a written contract had been entered into as a consummation of the transaction.

Only the Secretary of War was authorized by the statute to sell, and the terms were such as he deemed best. He alone could bind the Government, by the acceptance of the bid, and until accepted by him the bids could be rejected by him.

This was in accordance with the requirements of Section 3744 of the Revised Statutes, which requires contracts made by the Secretary of War to be in writing and signed by the parties at the end thereof, and the conditions of this sale clearly show an intention to fully comply with this section.

The Secretary of War had no authority to complete any such transaction as this without a full compliance with the statute, and until the formalities therein required had been fully complied with no contract or obligation on the part of the United States existed. Such was the conclusion of the Acting Attorney General in advising the Secretary of War upon this transaction (33 Op. A. G. 400).

Such is the law, as settled by the decisions of this Court.

*Clark* v. *United States*, 95 U. S. 539.

*South Boston Iron Co.* v. *United States*, 118 U. S. 37.

*Monroe* v. *United States*, 184 U. S. 524.

*St. Louis Hay and Grain Co.* v. *United States*, 191 U. S. 159.

In the *Monroe case* (184 U. S. 524) it appeared that the United States, through Captain Marshall of the Corps of Engineers, had advertised for proposals for constructing a canal. The plaintiffs submitted a bid, and that bid was accepted by Captain Marshall, acting under an authority contained in a letter from the Chief of Engineers of the United States Army. Thereafter, Captain Marshall forwarded to the plaintiffs a formal contract and bond to be executed within ten days, which plaintiffs executed and returned, and which were duly signed by Captain Marshall. The form of contract had been prepared by the Chief of Engineers and forwarded to Captain Marshall for use in such cases. Upon receiving notice of the acceptance of their bid the claimants began preparation for the work and did a considerable amount of preliminary work. Thereafter, and without fault on their part, and while the work was progressing, they were stopped by the United States and their contract abrogated, and the work which they had contracted to do readvertised, for the alleged reason that by the Act of August 1, 1892, no work could be prosecuted by the United States without a stipulation in the contract restricting a contractor not to have his workmen labor more than

eight hours a day. The contract contained a provision that it should be subject to the approval of the Chief of Engineers of the United States Army. The contractors thereupon sued in the Court of Claims for expenses incurred and for prospective profits.

The Court of Claims dismissed the petition and, upon appeal to this Court, its judgment was affirmed.

The contractors claimed that the advertisement, the bid, the submission thereof to the Chief of Engineers, his direction that it be accepted, the preparation of the formal contract on the blank furnished by the Chief of Engineers, and its execution by the officer in charge, constituted an approval. In delivering the opinion of this Court Mr. Justice McKenna said at page 527:

> We are unable to assent to this view. It is the final written instrument that the statute contemplates shall be executed and signed by the parties, and which shall contain and be the proof of their obligations and rights. And it was such written instrument that was to be approved by the Chief of Engineers. The approval was to be a future act. The provision of the contract was: "This contract" (that is, the instrument to which the contracting officer and the claimants attached their signatures and seals) "shall be subject to approval of the Chief of Engineers of the United States Army." The approval, therefore, did not consist of something precedent, but was to consist of something subsequent.

> That which preceded was inducement only, and contemplated an instrument of binding and remedial form, and hence to contain covenants imposing obligations and giving rights and remedies, containing provisions for the time of performance and the manner of it; provisions for changes and for extra work—indeed, of the provisions which prudence and necessity require and those which the statutes of the United States might require. And the final right to see that this was done, the parties agreed, should be devolved on the Chief of Engineers, and it was not satisfied by prior instructions. In other words, a final reviewing and approving judgment was given to the Chief of Engineers, and was given by a covenant so expressed as to constitute a condition precedent to the taking effect of the contract. If the covenant did not mean that it was idle.

In *South Boston Iron Company* v. *United States*, 118 U. S. 37, plaintiffs offered to construct new boilers for certain vessels of the Navy. By direction of the Secretary of the Navy, the offer was accepted in a letter signed by the Chief of the Bureau of Steam Engineering. Apparently performance was then begun, for shortly afterwards the Secretary notified the plaintiffs to discontinue work. Suit was brought in the Court of Claims, which dismissed the petition upon the ground that no contract has been executed in accordance with Section 3744, R. S. In affirming that judgment, this Court, by Mr. Chief Justice Waite, said, at page 42:

> An effort has been made in this case to show a contract in writing, but we agree entirely

> with the Court of Claims that the papers relied on for that purpose are nothing more in law or in fact that the preliminary memoranda made by the parties for use in preparing a contract for execution in the form required by law. This was never done, and, therefore, the United States never became bound. Within a very few days after the memoranda were made the whole matter was abandoned by the Department, and the Iron Company has neither performed any of the work which was referred to, nor has it ever been called on to do so.

In *Clark* v. *United States*, 95 U. S. 539, this Court, referring to this provision of law, said, at page 541:

> The Court of Claims has heretofore held the Act to be mandatory, and as requiring all contracts made with the departments named to be in conformity with it. The arguments by which this view has been enforced by that court are of great weight and, in our judgment, conclusive.

The Court of Claims has consistently followed this principle.

> *McLaughlin & Co.* v. *United States*, 36 Ct. Cls. 138.
>
> *Gillespie's Case*, 47 Ct. Cls. 310.
>
> *American Dredging Co.* v. *United States*, 49 Ct. Cls. 350.
>
> *St. Louis Hay & Grain Co.'s case*, 37 Ct. Cls. 281.

In affirming the latter case, 191 U. S. 159, Mr. Justice Holmes, writing for the Court, said, at page 163:

> Although, no doubt, both parties supposed their agreement binding, the Court of Claims held, and it is not disputed, that the contract was within Rev. Stat. § 3744, and not having been "reduced to writing, and signed by the contracting parties with their names at the end thereof," could not have been sued upon if it had not been performed. *Clark* v. *United States*, 95 U. S. 539; *South Boston Iron Co.* v. *United States*, 118 U. S. 37. See *Monroe* v. *United States*, 184 U. S. 524. It is argued by the claimant on this ground that it is entitled to maintain a *quantum valebat*.

Mr. Justice Holmes then points out that the "invalidity of the contract is immaterial after it has been performed," a principle not involved here, and in answer to the contention that the failure to reduce the contract to writing was the fault of the officers of the Government, said, page 163:

> Of course, different considerations would come in if the claimant had been subjected to a motive from which it had a right to be free, as, for instance, by fraud or duress. But there was nothing which the law could recognize as duress, and the suggestion that it was peculiarly the duty of the officers of the Government to see that the contract was put in binding form, is very far from making out an analogy to fraud. The claimant was bound to know the law at its peril.

It is to be noticed that the only officer authorized by the Act to make the sale was the Secretary of War. While he doubtless had discretion as to the manner in which bids should be obtained, the acceptance of the bid, the actual consummation of the sale was a matter solely within his power. He never approved the sale. On the contrary he rejected the plaintiffs' bid for its obvious inadequacy. An officer of the Government, charged with responsibility for its property, could hardly excuse or justify his act, had he sold Government property worth almost $2,000,000 for a little over $700,000, even though one of his subordinates had gone through the form of accepting the bid. Aside from the provision of Section 3744, R. S., sales under such a statute as we have here, should be regarded as analogous to judicial sales at auction, where the final power to confirm or set aside is always in the court. They afford a convenient method of obtaining bids, and do not effect a sale until confirmed.

The conditions of sale already set forth plainly contemplated not merely a written contract as required by law, but a more formal acceptance of the bid than the fall of the auctioneer's hammer. "Acceptance by the Government of any bid" was not to be final until the execution of a contract and bond, which was to be executed within ten days after "notice of the acceptance" of the bid, not ten days after the auctioneer had acted. The bid then tentatively accepted was to be submitted to the Secretary, and, if accepted by him, the bidder was to be given ten days

notice to execute the contract and bond. To hold that the action of the auctioneer was final would be to divest the Secretary of the responsibility and discretion conferred upon him by the statute.

There is another consideration which should be noticed. One of the terms of sale which was to be incorporated into the contract was a provision that the Government, at its election, might rescind the sale at any time before August 1, 1922, in which event the purchaser should immediately deliver to the Government sodium nitrate in equal quantity with that theretofore delivered by the Government to the purchaser.

Irrespective of any other considerations, this provision, in its practical effect, would give the Government the right to revoke, rescind or annul the sale—call it what you will—at any time.

From a practical standpoint, there would seem to be no difference between the reservation of a right in the Secretary of War to refuse to accept a bid and his right to accept the bid and in the next minute rescind the sale.

The cases of *Garfielde* v. *United States* (93 U. S. 242) and *United States* v. *Purcell Envelope Company* (249 U. S. 313) are not in point.

In the first place, Section 3744 of the Revised Statutes does not apply to the Post Office Department. It applies only to contracts made by the Secretary of War, Secretary of the Navy, and the Secretary of the Interior.

Furthermore, in the *Garfielde case*, the proposal made by Garfielde was accepted by the Postmaster General. In the *Purcell Envelope Company case* the proposal was accepted and a formal order entered awarding the contract to that company.

The suit arose over the attempt of a subsequent Postmaster General to cancel the contract made by his predecessor.

In the present case, in addition to the provisions of Section 3744 of the Revised Statutes and the other considerations mentioned, we have the fact that the Secretary of War, in whose discretion the statute vested the authority to sell, not only did not accept the bid, but rejected it upon the meritorious ground of its patent inadequacy.

There is no allegation that the Secretary acted fraudulently or in bad faith or from any unworthy motive.

## CONCLUSION

The judgment of the Court of Claims should be affirmed.

JAMES M. BECK,
*Solicitor General.*

ALFRED A. WHEAT,
*Special Assistant to the Attorney General.*

SEPTEMBER, 1924.

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## ERIE COAL & COKE CORPORATION *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 78. Argued October 15, 16, 1924.—Decided January 5, 1925.

1. Where by the terms and conditions set forth in the advertisement of a public sale of public property acceptance of a bid will not be final until execution of a contract between the bidder and the United States reserving to the Government the right to rescind the sale within a time specified, the Government may exercise the option by refusing to make such contract with the bidder to whom the property has been knocked down, and such refusal gives the bidder no cause of action against the United States. P. 520.
2. Rev. Stats., § 3744, requiring contracts to be reduced to writing and signed by the contracting parties with their names at the end thereof, applies to public sales of surplus supplies by the Secretary of War under the Act of July 11, 1919, 41 Stat. 105. P. 521.

58 Ct. Clms. 261, affirmed.

APPEAL from a judgment of the Court of Claims sustaining a demurrer and dismissing the petition.

*Mr. John S. Wise, Jr.*, with whom *Mr. Walter John King* was on the briefs, for appellant.

*Mr. Solicitor General Beck* and *Mr. Alfred A. Wheat*, Special Assistant to the Attorney General, appeared for the United States.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The judgment appealed from sustained a demurrer to plaintiff's petition and dismissed the case.

An act of Congress, approved July 11, 1919, 41 Stat. 105, authorized the Secretary of War to sell any surplus supplies then owned by and in the possession of the Government for the use of the War Department "upon such terms as may be deemed best." The petition alleged the following facts: The Secretary of War advertised approximately 40,000 tons of nitrate of sodium for sale at public auction at Washington, April 13, 1922. The advertisement stated that bidders would be required to make deposit of ten per cent. of the price of the nitrate purchased; that acceptance of any bid would not be final until the execution of a contract and bond and upon the failure by purchaser within ten days after notice of the acceptance of his bid to execute a contract, the United States might withdraw such acceptance, make other disposition of the nitrate, and retain the deposit as liquidated damages; and that the purchaser would be required, upon acceptance of his bid and before delivery of any nitrate, to enter into a written contract, providing that the Government "at its election may rescind said sale at any time before August 1, 1922, in which event the purchaser shall immediately . . . deliver to the Government . . . sodium nitrate in equal quantity with that theretofore delivered by the Government to purchaser . . . and the Government shall return to purchaser all money theretofore received in payment for such nitrates, and relieve him from any obligation for further payments . . ." The auction was held, and plaintiff was the highest bidder on three lots, amounting in all to 29,520

tons. The total of its bids was $711,500.[1] It deposited more than ten per cent. of that amount. The three lots were by the auctioneer knocked down and sold to plaintiff for the amount of its bids and upon the terms and conditions of the advertisement. Plaintiff was ready to perform on its part, and demanded that the Secretary execute a contract of sale in accordance with the terms set forth in the advertisement. But the Secretary refused on the ground that the prices offered were inadequate. Plaintiff's deposits were returned to it without prejudice to any of its claims against the United States. The market value of the nitrate was $1,919,870. And, by the petition, judgment was demanded for $1,208,370, the excess of market price over total of plaintiff's bids.

The terms and conditions of the sale as set forth in the advertisement were binding alike upon the United States and the bidders. If, after the receipt of plaintiff's bids, the contemplated contract had been executed, the United States thereby would have been authorized immediately to rescind the sale and bring the matter to an end by return of the deposit. But the Secretary, unwilling to accept the bids, refused to execute a contract and returned plaintiff's deposit. The right under the proposed contract to rescind was the equivalent of a reservation, in the published terms and conditions of the auction sale, of the right of vendor to reject any and all bids. Exercise of the option to terminate the contract of sale would have had the same effect and accomplished the same result as the rejection of the bids. The Secretary was not bound uselessly to execute the contract and then to rescind the sale in order to give effect to his decision not to let plain-

[1] Lot 1. 13,920 tons @ $25.00 a ton..... $348,000
Lot 2. 5,000 tons @ 25.00 a ton..... 125,000
Lot 3. 10,600 tons @ 22.50 a ton..... 238,500
$711,500 total bids

tiff have the nitrates at the prices offered. It follows that the refusal of the Secretary to make the contract of sale gave rise to no cause of action in favor of the plaintiff.

Moreover, § 3744, Revised Statutes, required the Secretary of War to cause every contract made by him, or by officers under him appointed to make contracts, "to be reduced to writing, and signed by the contracting parties with their names at the end thereof." The Act of July 11, 1919, authorizing the Secretary to sell surplus war supplies, is not inconsistent with that section and does not repeal or modify it. There is no reason why it should not apply to contracts made in pursuance of the later act. It must be held that, because of the failure to make and sign a written contract as required by § 3744, the United States was not bound. *Clark* v. *United States*, 95 U. S. 539, 541; *South Boston Iron Co.* v. *United States*, 118 U. S. 37, 42; *St. Louis Hay & Grain Co.* v. *United States*, 191 U. S. 159, 163. And see *Monroe* v. *United States*, 184 U. S. 524, 527; *United States* v. *New York & Porto Rico S. S. Co.*, 239 U. S. 88, 92; *Ackerlind* v. *United States*, 240 U. S. 531, 534.

*Judgment affirmed.*